



Australia's Advocacy for Abolition of the Death Penalty

**Joint Standing Committee on Foreign Affairs,
Defence and Trade**

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The Victorian Bar has endorsed this submission.

Executive Summary

1. The Law Council of Australia (LCA) and the Australian Bar Association (ABA) are pleased to participate in the Joint Standing Committee on Foreign Affairs, Defence and Trade's (**the Committee**) Inquiry into Australia's Advocacy for Abolition of the Death Penalty.
2. No person should be subjected to the death penalty irrespective of their nationality, personal characteristics, the nature of the crime of which they have been convicted, or the time and place of its alleged commission.¹
3. The LCA and ABA oppose the imposition of the death penalty irrespective of the method of execution.² The LCA and ABA are 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.³
4. The referral for the current Inquiry is to be commended as it demonstrates Australia's commitment to ensuring that it has a robust approach to advocating for worldwide abolition of the death penalty.
5. In this regard, this submission makes two key recommendations for further steps Australia could take to advocate for an end to the death penalty, including that:
 - Australia should develop a Strategy for Abolition of the Death Penalty, which outlines the methods it will employ to proactively advance the objective of global abolition; and
 - Australia should strengthen its domestic legal framework and arrangements to ensure Australia does not expose a person elsewhere to the real risk of execution.

¹ [Law Council Policy Statement: The Death Penalty](#) (2007), 2.

² Ibid.

³ Ibid.

Introduction

6. Australia is well placed to be a leading state actor and contributor to the fight against the death penalty, particularly within the Asia-Pacific region.
7. Australia holds a firm and long-standing position against the death penalty. No person has been executed in Australia since 2 February 1967. Since 1973 and the passage of the *Death Penalty Abolition Act 1973* (Cth), the death penalty has not been applied in respect of offences under the law of the Commonwealth and Territories.
8. Similar State legislation has outlawed the practice in the remaining Australian jurisdictions. Queensland was the first to abolish the death penalty for all crimes in 1922; New South Wales was the last in 1985.⁴
9. In 2010, with bipartisan support, the Commonwealth Parliament passed legislation to foreclose the possibility of any individual State jurisdiction reintroducing the death penalty.⁵
10. On 2 October 1990, Australia confirmed, at an international level, its opposition to the death penalty by ratifying the Second Optional Protocol to the *International Covenant on Civil and Political Rights* (**Second Optional Protocol**). More recently Australia has sponsored and voted in favour of United Nations General Assembly resolutions which called for an immediate moratorium on executions as a first step towards the universal abolition of the death penalty.
11. Australia has also been a principal actor in advocating for the abolition of the death penalty. Australia has previously advocated for a moratorium as a first step towards abolition. It has also called for it to be progressively restricted and insisted that it be carried out at least according to international minimum standards. Australia has also intervened in individual cases and privately raises concerns with relevant governments in bilateral dialogues.
12. However, there is much work to be done in advancing worldwide abolition of the death penalty. A number of states, including many in the Asia-Pacific region, continue to have criminal offences with the death penalty. Some of these states are yet to sign or ratify the Second Optional Protocol. Some have abolished *de facto* the use of the death penalty, while maintaining the penalty within their domestic legal framework.
13. The death penalty is cruel and inhuman, and has not been shown to deter crime (one of the major reasons advanced for its retention). Abolition is essential for the protection of human dignity and the right to life. Its abolition should be a key objective for Australia's human rights policy.
14. Before outlining further steps Australia could take to advocate for worldwide abolition, this submission provides some background to: the Law Council's policy on the death penalty; international law considerations; and the death penalty in Australia's Asia-Pacific region.

⁴ NSW abolished the death penalty for murder in 1955, but retained the death penalty for treason and piracy until 1985.

⁵ *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth).

Background

Long standing position on the death penalty

15. The LCA and ABA's longstanding position on the death penalty provides a principled basis for opposition to the death penalty. The Law Council's written policy may be of assistance in providing a principled foundation for Australia's advocacy in opposing the death penalty.⁶
16. The LCA and ABA absolutely oppose the imposition or execution of the death penalty irrespective of a person's nationality, personal characteristics, the nature of the crime of which they have been convicted, or the time and place of its alleged commission.
17. The LCA and ABA are opposed to the death penalty on the basis that it is a breach of the most fundamental human right: the right to life⁷, and that it is a breach of the right not to be subjected to cruel, inhuman or degrading punishment.⁸
18. The LCA and ABA are 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.
19. Consistent with the view that the death penalty represents a grave human rights violation, the LCA and ABA believe that it is a matter which transcends considerations of State sovereignty, and that it is a legitimate subject of comment and scrutiny by individuals outside the State or indeed by other States.
20. While the LCA and ABA's opposition to the death penalty is founded on a belief in the inherent dignity and inalienable rights of all human beings, it is also the LCA and ABA's position that:
 - there is no persuasive evidence that the death penalty deters would-be offenders any more effectively than other forms of punishment;
 - State-sanctioned retributive violence contributes to the legitimisation, normalisation and perpetuation of a broader societal culture of violence;
 - the death penalty is discriminatory in that studies show that it is disproportionately imposed on the poorest, least educated, most vulnerable members of society; and
 - no criminal justice system is perfect and, therefore the risk of executing the innocent can never be eliminated.⁹

⁶ [Law Council Policy Statement: The Death Penalty](#) (2007).

⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 3, and *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976), art 6.

⁸ *UDHR*, UN Doc A/810, art 5; *ICCPR* art 7; and *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), art 16.

⁹ [Law Council Policy Statement: The Death Penalty](#) (2007), 3.

International law considerations

21. In any consideration of methods Australia should employ in its advocacy to bring an end to the death penalty, it is also important to recognise that the death penalty is inconsistent with international human rights law, which seeks to uphold a fundamental and inherent right to life. Article 3 of the *Universal Declaration of Human Rights (UDHR)* provides: "Everyone has the right to life, liberty and security of person"¹⁰, while article 6 of the *International Covenant on Civil and Political Rights (ICCPR)* provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."¹¹
22. Although neither the UDHR nor the ICCPR, expressly, ban the use of capital punishment, paragraph 2 of article 6 of the ICCPR states that capital punishment may be imposed only for the "most serious crimes" in countries that have not abolished the death penalty.¹²
23. The United Nations Human Rights Committee noted in its General Comment 6:
*The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant.*¹³
24. Under the Second Optional Protocol, Australia, as a matter of international law, has undertaken to abolish the death penalty within its jurisdiction and also to prevent the execution of any person within the jurisdiction.¹⁴
25. In 2007, a landmark United Nations General Assembly resolution called for an immediate moratorium on executions as a first step towards the universal abolition of the death penalty. When it was first adopted by the United Nations General Assembly, it was supported by 104 states. In the most recent vote, in 2014, it was supported by 117 states.¹⁵ While not binding, this UN Resolution sends a powerful message that a large majority of the world's nations are committed to the abolition of the death penalty both within their own jurisdictions, and beyond their borders.¹⁶
26. While the consistent enforcement of international law is a major ongoing difficulty, nation States still take many steps to avoid being found to be in breach. It follows that proscriptions and restrictions in international law have a potential to influence behaviour and, to the extent that international law imposes those restrictions, there is

¹⁰ UDHR, UN Doc A/810, art 3.

¹¹ ICCPR art 6.

¹² Ibid art 6(2).

¹³ Human Rights Committee, *General Comment No 6: Article 6 (The right to life)*, 16th sess, (30 April 1982), art 7.

¹⁴ *Second Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 44/128 (adopted on 15 December 1989). On 2 October 1990, Australia ratified the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty.

¹⁵ *United Nations Moratorium on the Use of the Death Penalty*, GA Res69/186 UNGAOR, 69th sess, UN Doc A/RES/69/186 (18 December 2014).

¹⁶ Australia has supported the resolution each time it has been voted on in 2007, 2008, 2010 and 2014.

a potential for it to be used to influence national behaviour away from the use of capital punishment.¹⁷

The death penalty in the Asia-Pacific region

27. The Secretary General of the United Nations, Ban Ki-moon made the following comments about the state of the death penalty worldwide:

*Today, more than four out of five countries have either abolished the death penalty or do not practice it. Globally, there is a firm trend towards abolition, with progress in all regions of the world. Member States representing a variety of legal systems, traditions, cultures and religious backgrounds have taken a position in favour of abolition of the death penalty. Some States that opposed the abolition of the death penalty in the recent past have moved to abolish it; others have imposed a moratorium on its use. The application of the death penalty appears to be confined to an ever-narrowing minority of countries. Those remaining States cite a number of reasons for retaining the death penalty, including what they see as its deterrent effect; that it is consistent with public opinion; that it is equally applied against all perpetrators; and that there are sufficient judicial safeguards to ensure defendants are not wrongfully convicted.*¹⁸

28. Although there may be a global trend towards abolition of the death penalty, Amnesty International's annual reports indicate that nine countries carried out executions every year from 2009 to 2013 including: Bangladesh, China, Iran (Islamic Republic of), Iraq, the People's Democratic Republic of Korea, Saudi Arabia, the Sudan, the United States of America and Yemen.¹⁹
29. In Asia the death penalty remains prevalent.²⁰ After a four year hiatus in executions between 2009 and 2012, Indonesia executed 5 people in 2013. While no executions were carried out in 2014, in January 2015 the Indonesian Attorney-General announced that around 60 prisoners were facing execution. So far this year Indonesia has executed 14 people and at least 125 people are on death row.²¹
30. China is the world's top executioner, with over 1,000 executions in 2014, which is more than the rest of the world combined. The actual number of executions is a state secret, as it is in North Korea.²² However, in a positive step, the Supreme People's Court has issued legal guidelines aimed at ensuring greater procedural protections in death penalty cases.²³
31. Despite the situation in Indonesia and China, the trend in South-East Asia seems to reflect the broader trend towards abolition. Cambodia, the Philippines and Timor-Leste have removed capital punishment from their national law, and the Lao People's Republic and Myanmar are abolitionist in practice.²⁴ Thailand has not carried out an

¹⁷ S. Keim SC and B. Armstrong, *Fighting to the Death: Thoughts for Anti-Death Penalty Activists to make Further Progress towards the Goal of an End to Judicial and Extra-Judicial Executions* (2015)

¹⁸ Office of the High Commissioner for Human Rights, [Moving Away from the Death Penalty: Arguments, Trends and Perspectives](#) (2014) 7.

¹⁹ Office of the High Commissioner for Human Rights Regional Office for South-East Asia, [Moving Away from the Death Penalty: Lessons in South-East Asia](#) (2014) 7.

²⁰ Amnesty International et al, *Australian Government and the Death Penalty: A Way Forward* (2015), 2.

²¹ Ibid.

²² Ibid, 3.

²³ Office of the High Commissioner for Human Rights, [Moving Away from the Death Penalty: Arguments, Trends and Perspectives](#) (2014) 192.

²⁴ Office of the High Commissioner for Human Rights Regional Office for South-East Asia, [Moving Away from the Death Penalty: Lessons in South-East Asia](#) (2014) 19.

execution since 2009.²⁵ Singapore²⁶, Malaysia²⁷ and Vietnam²⁸ have either reduced the number of offences liable to mandatory use of the death penalty or have reduced the number of offences liable to capital punishment.²⁹

32. Importantly, Cambodia, Indonesia, Lao People's Democratic Republic, the Philippines, Thailand, and Vietnam, have ratified the ICCPR, and the Philippines has ratified the Second Optional Protocol to the ICCPR.³⁰ These legal developments are crucial as they increase the safeguards surrounding use of the death penalty and reduce the scope of its application, and are key steps towards total abolition.³¹
33. On 27 March 2014, a court in Japan ordered a retrial and immediate release for Iwao Hakamada, who had spent 46 years in solitary confinement on death row. He had been convicted after an unfair trial on the basis of a forced confession.³²
34. The trend toward abolition of the death penalty continued in February of this year when Fiji became the 99th country to become death penalty-free.³³ However, there have also been recent set backs, with Papua New Guinea expanding the scope of the death penalty in its Criminal Code, and Brunei Darussalam introducing a new penal code which stipulates the death penalty for numerous offences.³⁴
35. These set backs and the number of executions that continue to occur in the Asia-Pacific region suggest that ongoing vigilance is required. As a highly competent nation, which seeks to uphold the rule of law, Australia should give its advocacy on ending death penalty the full weight it deserves and needs. This requires a more strategic approach in Australia's advocacy for worldwide abolition of the death penalty.

Further advocacy steps

Australian Strategy for Abolition of the Death Penalty

36. In continuing efforts to secure the abolition of the death penalty universally and particularly in the Asia-Pacific region, the LCA and the ABA recommend that Australia develop a Strategy for Abolition of the Death Penalty and that dedicated resources be provided for achieving the objectives of the strategy.³⁵
37. Benefits of developing an Australian strategy include:

²⁵ However, Thai death row grew by at least 55 people in 2014.

²⁶ Singapore executed two prisoners in 2014, ending a moratorium in place since 2012. In 2015 there has been one execution.

²⁷ In 2014, Malaysia executed at least two prisoners and sentenced at least 38 people to death.

²⁸ A 2004 decree in Vietnam classifies death penalty statistics a state secret, making it difficult to estimate the number of executions each year.

²⁹ Office of the High Commissioner for Human Rights Regional Office for South-East Asia, [Moving Away from the Death Penalty: Lessons in South-East Asia](#) (2014).

³⁰ Office of the High Commissioner for Human Rights, [Moving Away from the Death Penalty: Arguments, Trends and Perspectives](#) (2014) 192.

³¹ Ibid, 194.

³² Ibid. In the same year, two people were executed and 128 people remained on death row at the close of 2014.

³³ Amnesty International et al, *Australian Government and the Death Penalty: A Way Forward* (2015) 3.

³⁴ Ibid.

³⁵ Effective implementation of the Strategy will require a considerable amount of skilled foreign affairs and diplomatic assistance. Adequate resourcing is also required to ensure that ad hoc opportunities to press for abolition (that may not be identified in the Strategy) are taken up.

- assisting Australia to define and align its goals regarding promoting the abolition of the death penalty with Australian values;
 - directing Australia's global work to abolish the death penalty;
 - providing a framework for specific projects;
 - assisting in keeping Australia focused on its goals;
 - assisting in managing expectations as to why Australia may choose a specific route in its promotion of the abolition of the death penalty;
 - demonstrating Australia's commitment to promote the abolition of the death penalty;
 - providing a framework and clear role for all Australian embassies and high commissions to promote abolition; and
 - providing transparency through reporting requirements.
38. Any strategy should be developed in close consultation with relevant national and international stakeholders with expertise in death penalty matters. The UK Strategy on the Abolition of the Death Penalty³⁶ may also provide a useful starting point in developing an Australian strategy.
39. The below information provides some of the possible elements that could inform an Australian Strategy on the Abolition of the Death Penalty. The elements suggested are not intended to be an exhaustive guide.

Vision, goals and guiding principles

40. An Australian strategy should explain Australia's vision, policy and basis of its opposition to the death penalty. The Law Council Policy Statement on the Death Penalty may assist in this regard.
41. A strategy should also set out Australia's goals and mechanisms to achieve those goals. Developing goals will help Australia to create specific and feasible ways in which to carry out its vision.
42. Potential goals could be in similar terms to the UK's Strategy on the Abolition of the Death Penalty. These goals include to: advance our objective of global abolition; increase the number of abolitionist countries or those with a moratorium; reduce the numbers of executions and further restrict use of the death penalty; and ensure that where the death penalty remains, minimum standards are met.³⁷
43. The strategy should also identify the importance of a presenting a unified effort, and nominate one independent body or government agency to direct such efforts³⁸. Further, the strategy should identify who will be responsible for delivering key messages, for example ambassadors or the Minister for Foreign Affairs and Trade.

³⁶ UK Foreign Commonwealth Office, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011.

³⁷ *Ibid*, 1, 6.

³⁸ Possibilities include DFAT, a government-backed organisation such as the Australian Strategic Policy Institute, or the Law Council.

Specific strategies

44. Consideration should be given to including the below methods in an Australian strategy to achieve our aims. If it is not accepted that Australia should develop such a strategy, these methods may nonetheless assist the Committee in its consideration of what further steps Australia could take to advocate for worldwide abolition.

Bilateral initiatives

- Engage in continued dialogue and consultation – where relevant, Australia should raise the issue of the death penalty in its dialogues and consultations with other countries. Key issues that could be discussed include:
 - Australia's firm and long-standing universal opposition to the death penalty.
 - the need for abolition – including using relevant case law with respect to international law and capital punishment to promote the need for abolition.
 - where the death penalty is retained, Australia could emphasise:
 - urging states to use the death penalty only for truly exceptional crimes and to restrict the offences which attract the death penalty.
 - urging states to only use the death penalty in line with the minimum standards as provided by the Second Optional Protocol, and to maintain maximum transparency, including through publishing accurate information about the death penalty and its use.
 - urging states to consider an immediate moratorium on executions as a first step towards ultimate abolition and to show clemency on those sentenced to death.
 - urging states to periodically publish statistics on executions. Such transparency would assist states to monitor the number of death sentences and in reaching any objective to reduce the number of death sentences.
 - examples where people have been exonerated and freed from death row.
 - practical problems that may exist with retention of the death penalty – for example, bungled executions.
 - feasible alternative sanctions.
 - credible abolition methods in the context of the specific country.

- ensuring that the highest standards of fair trial and due process guarantees are upheld, and international law and human rights norms are respected in all death-penalty cases³⁹
 - ensuring that safeguards and special protections for vulnerable groups are in place, so that the death penalty is not imposed on children, pregnant women, persons with mental or intellectual disabilities, and the elderly.⁴⁰
 - ensuring transparency regarding individual cases of capital punishment. Specifically ensuring access to information by prisoners, their family members and the public; and ensuring that data on the use of the death penalty is publicly available, including the number of sentences handed down, executions carried out and individuals on death row.⁴¹
 - encouraging the removal of the mandatory death penalty from domestic law.
 - arguments against the death penalty which address arguments for retention of the death penalty including: national sovereignty, state's prerogatives and against western neo-imperialism; country specific arguments, including for reasons of national security; religious reasons; and democratic support for the death penalty.
- Encourage ratification of the Second Optional Protocol and domestic implementation – including moving countries from de facto abolition to signing the Protocol.
 - Encourage restriction of the death penalty to only truly exceptional crimes as an important first step for some countries towards abolition.
 - Engage in political dialogues, including through raising the death penalty in bilateral and human rights dialogues.⁴²
 - Raise individual cases of Australian citizens and use all appropriate influence to prevent the execution of any Australian citizen.⁴³
 - Raise individual cases of third country nationals where deemed necessary and/or effective, for example when minimum standards have not been met.⁴⁴
 - Fund projects in Australia and foreign countries by NGOs, governments and local institutions to promote abolition in retentionist countries.
 - Support appropriate legal challenges to the death penalty.

³⁹ Office of the High Commissioner for Human Rights, Regional Office for South-East Asia, *Moving away from the Death Penalty: Lessons in South-East Asia*, 28.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² UK Foreign Commonwealth Office, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011, 6.

⁴³ Ibid.

⁴⁴ Ibid.

- Develop country plans and encourage posts in these countries to proactively drive forward the death penalty agenda.

Regional initiatives

- Initiate a regional coalition against capital punishment⁴⁵ – in partnership with Asian and Pacific states, Australia should work towards abolition.
- Create a council of eminent persons, including senior judges and lawyers, to act as influencers and advance regional discussions in private and public fora.⁴⁶
- Seek out a variety of voices from, for example, different political and religious leaders or key influencers to promote the abolition of the death penalty.
- Bring consistency to Australia's rhetoric on the death penalty – providing consistent and strong opposition to the death penalty regardless of the nationality of the condemned.⁴⁷
- Lobby to restrict and reduce its application in retentionist countries.⁴⁸
- General demarches in favour of abolition for the death penalty in other countries.⁴⁹
- Pursue common action by ASEAN countries in international fora such as the UN – including by taking a coordinated approach to UN Resolutions on the death penalty.⁵⁰
- Transnational coalition-building to provide best practice, political support and local mobilisation, including by garnering support and assisting local institutions or key influencers to advocate for abolition.
- Become more involved in educational and awareness-raising programs and activities in the Asia-Pacific region in order to secure sustained support.
- Fund projects in Australia and foreign countries by NGOs, governments and local institutions to promote abolition in retentionist countries.
- Bring the need to abolish the death penalty to the attention of countries in our region.
- In line with United Nations, international and regional human rights bodies, expedite efforts to impose an official moratorium on all executions and

⁴⁵ Lowy Institute for International Policy, *Policy Brief: Capital Punishment and Australian Foreign Policy*, August 2006, 1. See also Office of the High Commissioner for Human Rights, Regional Office for South-East Asia, *Moving away from the Death Penalty: Lessons in South-East Asia*, 27.

⁴⁶ Justice Lasry has previously promoted the concept of an eminent person's council. See: Anna Henderson, 'Australia must lobby Indonesia, US and China to end capital punishment: Supreme Court judge Lex Lasry', *ABC News* (29 April 2015).

⁴⁷ Lowy Institute for International Policy, *Policy Brief: Capital Punishment and Australian Foreign Policy*, August 2006, 1, 5.

⁴⁸ UK Foreign Commonwealth Office, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011, 6.

⁴⁹ *Ibid.*, 7.

⁵⁰ *Ibid.*

commute all sentences, with a view to eventually abolishing the death penalty.⁵¹

- Foster close cooperation with strategic partners, including UN bodies such as the Office of the High Commissioner for Human Rights, international and national NGOs, national human rights institutions and civil society organisations and ASEAN.

The UN

- Support the UN General Assembly Resolution on the Moratorium on the use of the Death Penalty biennially, work with others and lobby where required to secure appropriate language and increased support for each successive resolution.⁵²
- Make recommendations to specific countries through the Universal Periodic Review process, and follow up on recommendations which have been accepted, for example through funded projects or lobbying activities.⁵³
- Follow up on recommendations made by the UN Human Rights Committee⁵⁴ and voice objection to capital punishment at the UN Human Rights Council.
- Support the UN Rapporteur on extrajudicial, summary or arbitrary executions – act on the basis of his reports, and use them as a tool to assist.⁵⁵

The Commonwealth

- Look to expand the work Australia does through the Commonwealth given the number of Commonwealth countries who retain the death penalty, for example, through, the Commonwealth Heads of Government Meetings, the Commonwealth Ministerial Action Group, the Eminent Persons Group, the Commonwealth Lawyers Association, and by working with Commonwealth countries who support abolition.⁵⁶

Communications strategy

- Develop a communications strategy to convey clear consistent messaging and employ a range of communications methods. This strategy should apply not only to Australia's international advocacy, but also to advocacy within Australia to activate and mobilise the Australian community.
- Organise public debate by providing opportunities for intergovernmental organisations, international and regional organisations and governments to engage in discussions about the death penalty;

⁵¹ Office of the High Commissioner for Human Rights, Regional Office for South-East Asia, *Moving away from the Death Penalty: Lessons in South-East Asia*, 27.

⁵² UK Foreign Commonwealth Office, *HMG Strategy for Abolition of the Death Penalty 2010-2015*, October 2011, 6.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

45. The Australian Strategy could also outline how Australian embassies and high commissions are to deliver our objectives on the death penalty in similar terms to the UK Strategy.
46. The Strategy should also include appropriate reporting requirements to assist the Australian and international community to have clarification around Australia's efforts to advocate for worldwide abolition.

Recommendation:

- **Australia should develop a Strategy for Abolition of the Death Penalty, which outlines the methods it will employ to proactively advance the objective of global abolition.**

Australia's domestic legal framework

47. Australia should accelerate its efforts on comprehensive abolition of the death penalty by ensuring that its own domestic legal framework and arrangements do not expose a person to the real risk of execution. If Australia's legal framework permits such exposure, then Australia is open to accusations by other nations of an inconsistent and equivocal approach. Strengthening Australia's domestic legal framework and arrangements is likely to augment Australia's credibility in opposing certain executions and its general advocacy against the death penalty.
48. On 11 March 2010, the Law Council welcomed the passage of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth). This Act amended the *Death Penalty Abolition Act 1973* (Cth) to foreclose the possibility of any individual Australian jurisdiction reintroducing the death penalty.
49. However, more can be done to ensure that Australian law enforcement agencies only cooperate with foreign law enforcement agencies to the extent that such cooperation is consistent with Australia's obligation not to expose a person to the real risk of execution. The LCA and the ABA consider that Australian authorities should cooperate with and assist jurisdictions in dealing with transnational crime. Australians committing a criminal offence in another country are rightly subject to the laws of that jurisdiction. Nonetheless, cooperation must be conditional in cases involving the arrest, prosecution, conviction or sentencing of any person for an offence carrying the death penalty.
50. Under the *Extradition Act 1988* (Cth) a person may not be extradited to a foreign country where there is a real risk that the death penalty would be carried out upon the person. There is no distinction in terms of policy or outcome between extraditing a person to face the death penalty and assisting in an investigation leading to the death penalty.

Legislative Reform

51. There are currently no Australian laws or prohibitions in the AFP Guidelines on the Death Penalty, which require the AFP to seek a guarantee that information it provides will not be used by overseas authorities to seek or impose the death penalty against a perpetrator.
52. Accordingly, consideration could be given to amending the *Australian Federal Police Act 1979* (Cth) to prevent future disclosure of information to overseas authorities that

might lead to the real risk of a person being exposed to the death penalty. In this context, the Office of the High Commissioner for Human Rights has recommended that countries should:

*...amend domestic laws on extradition and deportation of persons to specifically prohibit involuntary transfer of persons to States where there is a genuine risk that the death penalty may be imposed in violation of internationally recognised standards, unless adequate safeguards are established to ensure that the death penalty will not be carried out.*⁵⁷

53. Reports indicate that, between December 2009 and December 2014, a vast majority of the 1847 people whose names were provided by the AFP to foreign police forces were being investigated for drug offences in countries where the death penalty is widely imposed and sometimes applied.⁵⁸ It is not clear how many of these are Australian citizens. Reports have also suggested that between 3-15 requests for assistance in cases which may involve the death penalty were denied by the AFP.⁵⁹
54. These figures, if accurate, reveal that the AFP when exercising its discretion to disclose information considers a range of factors, one of which may be the risk of the death penalty. However, it is not clear how the risk of the death penalty is weighted in favour or against the provision of information in death-penalty cases. Nonetheless, the figures appear to indicate that requests for assistance from death-penalty states are approved in the vast majority of cases.
55. The issue is then whether this is an appropriate outcome in light of Australia's opposition to the death penalty. Legislative reform would relieve the AFP of the burden of making such complex decisions in life and death matters and where there may be counter-veiling transnational cooperation objectives.
56. The LCA and the ABA would support 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. The Human Rights Law Centre has previously proposed a form of amendment to section 60A of the Act in this regard.

AFP Guidelines

57. Consideration could also be given to reviewing or amending the *Australian Federal Police National Guideline on International Police-To-Police Assistance in Death Penalty Situations* (**AFP Guidelines**) 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. In these circumstances it may be appropriate for the AFP Guidelines to:
 - require the AFP to seek Ministerial approval before sharing information with a foreign agency in potential death penalty cases. This restriction should apply notwithstanding that no person has yet been detained or arrested;
 - contain a clear prohibition on sharing information in death penalty cases unless strict criteria are met, such as the receipt of an official undertaking not to impose, or, if imposed, not to carry out, the death penalty;

⁵⁷ Office of the High Commissioner for Human Rights, Regional Office for South-East Asia, *Moving away from the Death Penalty: Lessons in South-East Asia*, 28.

⁵⁸ Michael Bachelard, 'Death penalty: Australian Federal Police dubs 1847 suspects', *Sydney Morning Herald*, 7 September 2015.

⁵⁹ Sarah Gill, 'AFP actions at odds with death-penalty foes', *The Age*, 22 September 2015.

- establish, as an overriding principle, that information and assistance should only be provided in death penalty cases 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 (exceptional circumstances would not be considered to exist if any possibility remains that the death penalty may be imposed);
- remove certain factors from the Guidelines which should be taken into account in determining whether to provide assistance in death penalty cases, including the age, nationality and circumstances of the suspect. Such considerations appear inconsistent with absolute opposition to the death penalty – which would dictate that the personal characteristics of the suspect are irrelevant; and
- remove the requirement to consider 'Australia's interest in promoting and securing cooperation from overseas agencies in combating crime'. Again, this consideration suggests that Australia's opposition to the death penalty is not absolute and can be put aside where it is expedient for other purposes. In the LCA and ABA's view, the death penalty should not be condoned, tolerated or facilitated by Australian authorities for any purpose.

58. The LCA and the ABA are pleased to note the AFP Guidelines:

- require Ministerial approval to be given before information or assistance can be provided in a death penalty case from the time a suspect is detained rather than from the time a charge has been laid; and
- establish public criteria and an internal approval process for providing information and assistance in death penalty cases, which must be complied with even at the early stages of an investigation where no suspect has been detained or charged.

59. Despite these positive aspects, the AFP Guidelines continue 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 Australian citizens being subjected to the death penalty, the exercise of discretion by the AFP should be narrowly constrained.

Mutual Assistance Act

60. Subsection 8(1A) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (**Mutual Assistance Act**) requires the Attorney-General to refuse a mutual assistance request in death penalty cases where a person has been arrested or detained. Subsection 8(1A) also permits the Attorney-General to provide assistance in death penalty cases where he or she is satisfied that 'special circumstances' exist. 'Special circumstances' are not defined in the Mutual Assistance Act.

61. Clarity around what is meant by 'special circumstance' in the legislation would assist in providing the community with reassurance that mutual assistance will only be provided in appropriate cases. For example, special circumstances may include where the evidence would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty. The LCA and the ABA suggest that consideration be given to amending the Mutual Assistance Act to clearly define 'special circumstances'. Otherwise, there is nothing in the legislation itself that would limit the Attorney-General's discretion to determine what would consist of a 'special circumstance'. The breadth of this discretion may create a risk, despite good

intentions, that Australian assistance prior to arrest or detention may lead to the imposition of the death penalty.

Recommendation:

- **Australia should strengthen its domestic legal framework and arrangements to ensure Australia does not expose a person elsewhere to the real risk of execution.**