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AFP

AUSTRALIAN FEDERAL POLICE



Joint Standing Committee on Foreign Affairs Defence and Trade

Human Rights Sub-
Committee on the Inquiry
into Australia's Advocacy
for the Abolition of the
Death Penalty

September
2015

Submission by the
Australian Federal Police

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1. Introduction

The AFP welcomes the opportunity to make a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade as part of its inquiry into Australia's advocacy for the abolition of the Death Penalty.

The AFP's role includes responding to transnational crime and, for many years, the AFP policy has been to combat criminal activity at its source. This is more often than not in foreign countries. The real-time exchange of tactical police information is an essential part of the AFP's ability to combat transnational crime. As has been extensively reported in the media this has, in rare circumstances, resulted in a sentence of death being handed down to an Australian citizen abroad. Importantly the provision of information can also be exculpatory. The sharing of information involves working closely with countries that have disparate legal systems to Australia and criminal penalties that can be more severe than ours.

It is not in the AFP's remit to advocate to other countries or their law enforcement agencies for the abolition of the death penalty. The AFP operates strictly under the *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Matters* which is in accordance with Australia's long standing opposition to the death penalty. The AFP's role is to act in accordance with Australian and international policies and guidelines regarding the provision of information to foreign jurisdictions in death penalty matters.

All cooperation between the AFP and foreign jurisdictions is in line with Australia's obligations under international treaties on combating drug trafficking and transnational crime, namely:

- *The United Nations Convention against Transnational Organized Crime;*
- *The Single Convention on Narcotic Drugs;*
- *The United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;* and
- *Second Optional Protocol to the International Covenant on Civil and Political Rights.*

It is essential in this cooperation that the AFP respects the laws and sovereignty of other nations in fighting transnational crime, as they respect ours.

Working cooperatively with overseas law enforcement agencies has been demonstrably successful for Australia in combatting many crime types. Without the ability to work with all of our international partners the AFP would be hindered in performing the roles expected by Government and the Australian community.

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2. AFP response to the Terms of Reference

The Joint Standing Committee on Foreign Affairs, Defence and Trade will inquire into and report on Australia's efforts to advocate for worldwide abolition of the death penalty, having particular regard to:

- reviewing how Australia currently engages internationally to promote abolition of the death penalty; and
- further steps Australia could take to advocate for worldwide abolition, including by:
 - engaging with international institutions and like-minded countries;
 - cooperating with non-government organisations;
 - bilateral engagements and other diplomatic activities; and
 - other appropriate means.

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3. The AFP's role as the Australian Government's primary law enforcement agency

Keeping Australia and Australians safe

The AFP has a mandate and a strong focus on preventing transnational crime. The AFP's strategy over recent years has been to combat transnational crime at its source to minimise the impact on Australians and Australian interests both domestically and internationally. Elements of transnational organised crime syndicates and terrorist groups who are targeting Australia and Australians are based outside of Australia, including a number of countries which have the death penalty. If we do not partner with those countries our ability to disrupt those groups is significantly impaired.

Since 2012, the AFP has seized nearly 10 tonnes of amphetamines, two tonnes of cocaine, and one tonne of heroin, as well as vast quantities of cannabis, precursors, and sedatives combining to a total weight of 20.3 tonnes.

These seizures add up to a combined street value of \$13.114 billion and have resulted in the successful disruption of multiple international drug syndicates including the arrest and prosecution of suspects. Without international cooperation these drugs would have been sold and distributed to Australian communities with significant consequences for individuals and their families.

The AFP operating environment offshore

The need to balance law enforcement with appropriate justice outcomes is an extremely important consideration, as is the AFP's responsibility to ensure the safety and security of the Australian community.

The AFP operates in a complex international environment characterised by different legal systems. The diversity of these legal systems reflects great variation in the social values underpinning them, including tolerance of capital punishment as embodied in law.

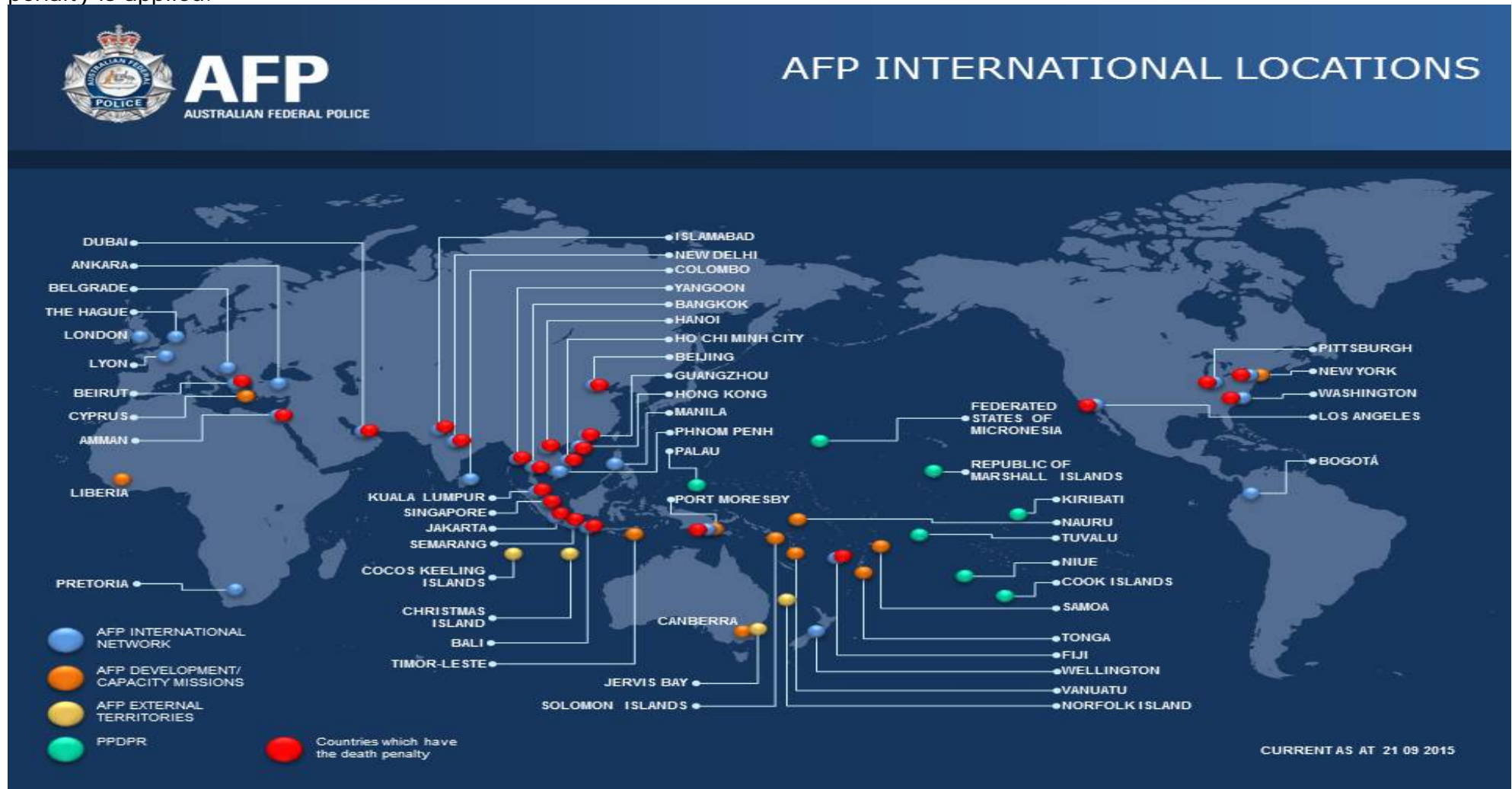
All AFP's offshore operational activities are undertaken with the consent of the foreign jurisdiction, in accordance with the local laws and procedures, and in accordance with Australian law.

The AFP's involvement in combating transnational crime in the region primarily involves drug trafficking, however the death penalty may also result from other transnational crimes of which the AFP provides cooperation.

Cooperation with foreign law enforcement agencies is critical to AFP's efforts to combat serious and organised crime activity, and threats to Australia's national security. Working cooperatively with overseas law enforcement agencies has proved very successful in relation to combating all crime types, including terrorism, child exploitation, human trafficking, people smuggling and the importation of illicit drugs to Australia.

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The below map illustrates the AFP's International Network posts across the globe, including those posts where the death penalty is applied.



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4. Australian Federal Police Governance Framework

The AFP has a robust governance framework which sets out the AFP's obligations in relation to the exchange of information with foreign law enforcement agencies on death penalty matters. This is underpinned by the *Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations*, see Attachment A.

Ministerial Direction

The AFP is first and foremost governed by the Ministerial Direction, referred to in the *Australian Federal Police Act 1979* (the Act). Under the Act the AFP Commissioner has responsibility for the general administration of the AFP and the control of its operations. The responsible Minister may give written direction to the AFP Commissioner with respect to the general policy to be pursued by the AFP in the performance of its functions, after consulting the Secretary of the Attorney-General's Department.

The Ministerial Direction complements existing AFP internal guidelines and is a high-level strategic document which does not detail specific operational matters.

Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations (2009-Current)

The current *Australian Federal Police (AFP) National Guideline on International Police-to-Police Assistance in Death Penalty Situations* (the Guideline) is consistent with Australia's international obligations. The Guideline was developed, in 2009 and continues to be amended as required, so the AFP can continue to ensure the safety and security of the Australian community from a broad range of criminal activities.

The Guideline requires consideration of a range of factors relevant to the decision making process in death penalty matters and ensures a structured and transparent process. It also applies only to the provision of assistance, including the sharing of information, which can be provided by police to police. The Guideline provides for a more structured process for determining whether assistance is to be provided, including specific factors that must be considered by a member of the AFP Executive (Senior AFP management - Manager/SES-level1 and above) before approving assistance prior to arrest, charge, detention or conviction.

The AFP has and will continue to seek assurances to foreign law enforcement partners that the death penalty will not be sought prior to the provision of information.

Under the Guideline, 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. 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. The

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Guideline also provides a decision making procedure for authorising such cooperation.

The predecessor to the current Guideline was the *AFP Practical Guide on International Police-to-Police Assistance in Death Penalty Charge situations* (the Practical Guide). In a governance context a Practical Guide provides advice to guide members in a specific situation, but is not enforceable. In contrast, a National Guide is an AFP policy which members are expected to adhere to.

The AFP Practical Guide on International Police-to-Police Assistance in Death Penalty Charge Situations (1993-2009)

The *AFP Practical Guide on International Police-to-Police Assistance in Death Penalty Charge Situations* was established in 1993 based on government policy and was supported by successive Australian Governments.

Prior to the arrest, laying of charges and subsequent conviction and sentencing of Bali 9 members, Andrew Chan and Myuran Sukumaran in 2005, the Practical Guide permitted assistance to be provided pre-charge; irrespective of whether the assistance resulted in charges being laid for an offence attracting the death penalty. Ministerial approval was required to provide assistance post-charge.

In 2006, a review of the AFP Practical Guide was conducted by Justice Finn of the Federal Court. Justice Finn recommended the AFP review its processes in relation to the death penalty in order to strike a better balance between justice outcomes and the AFP's responsibility to protect the community from criminal activities. Since this judgement, the AFP has continually reviewed and updated its guidelines.

As a result, the AFP Practical Guide was significantly amended in 2009 by the AFP and the Attorney-General's Department to create the Guideline.

Exchange of information requests with foreign law enforcement

Multiple requests for information can be made in relation to one individual resulting in a misrepresentation of the widely reported figures.

The following tables identify the actual number of requests for information approved both internally and by the Minister in potential death penalty matters from international law enforcement agencies.

The approved requests in Table 1 and Table 2 met the required standards as prescribed within the governance framework as per the Guideline for the information to be released.

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Table 1

<u>AFP approved information sharing in potential death penalty matters</u>			
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

**A single request may relate to numerous persons of interest*

Table 2

<u>Ministerial approved information sharing in potential death penalty matters</u>			
Year	Total Requests	Approved	Not Approved
2010	1	1	0
2011	1	1	0
2012	8*	7	0
2013	3	3	0
2014	11	11	0

**One not progressed to Minister*

In Table 2 the increase that occurred last year was mainly due to the Guangzhou 9 (seeking Minister's approval for AFP to speak to them) and assistance to an Australian in Vietnam. All of these arrests/prosecutions had no AFP involvement.

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5. Cooperation with Law Enforcement partners

AFP International Network

The AFP engages in a range of activities offshore to partner in transnational crime investigations. The cornerstone of this activity is the AFP's International Network, with approximately 100 members deployed across 30 countries. AFP members work on a range of bilateral and multilateral investigations in close partnership with host country law enforcement agencies.

The AFP's ability to detect and prevent crime is reliant upon strong reciprocal relationships with international law enforcement partners that facilitate the exchange of criminal intelligence and information.

Information Sharing

In addition to sharing criminal information the AFP shares information about contemporary best-practice in law enforcement and capacity development with its international partners. This information exchange occurs through formal and informal relationships, people-to-people exchanges through AFP members deployed offshore, senior official visits to and from Australia, and the maintenance of key relationships with the foreign law enforcement community in Australia. The AFP hosts and sponsors conferences, participates in high-level specialist forums and facilitates officer exchange programs. The nature of the information shared is not always incriminating and in some instances is exculpatory material, which may be used to exonerate the individual.

AFP Police-to-Police relationships

The AFP's ability to build and maintain effective international partnerships is essential to fighting crime at its source and thereby protecting the Australian community. The Australian Government continues to stress the importance of strong international relationships to disable organised crime networks, develop law enforcement capabilities and enhance our understanding of how organised crime operates.

The AFP has long standing cooperative relationships with many international law enforcement partners. This cooperation focuses on all forms of transnational crime in a manner consistent with the AFP's legal obligations and our respective national laws.

Law enforcement agencies routinely share information with their foreign counterparts. It can create strong relationships based on the mutual objectives of crime prevention and disruption, even where the political ideologies of two countries may hinder diplomatic cooperation.

An example of this cooperation is the AFP's long standing cooperative relationship with all facets of United States (US) Law Enforcement.

The law enforcement environment in the US is complex in comparison to Australia's, with over 18,000 individual law enforcement agencies with diverse jurisdictions and responsibilities.

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The AFP maintains a strong relationship with law enforcement in the US, however like many other nations in the Asia Pacific region, the US has the death penalty. Florida remains the only state to apply the death penalty for drug related crimes, specifically drug trafficking where a person was killed or seriously wounded in the commission of the crime.

The AFP's cooperation with partners in the Asia Pacific region is integral to combatting transnational crime in transit and source countries, many of which carry the death penalty. The AFP would not have been able to achieve its longstanding operational results without significant cooperation between the AFP and international law enforcement agencies.

For example, between 2012 and 2015, the AFP and its partner agencies have seized approximately 20.3 tonnes of illicit substances. Many of these seizures relied upon information from foreign law enforcement partners.

Additionally, in early 2015, an international investigation involving AFP and Thai law enforcement agencies resulted in the seizure of 140 kilograms of heroin (with a potential street value of up to \$95 million) destined for Australia. Cooperation such as this is integral to prevent harm to the Australian community.

There are 100 countries that retain the death penalty as a punishment for a variety of crimes, noting many are now considered abolitionist in practice. The list of these countries can be found at Attachment B.

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6. Conclusion

The AFP, as the Australian Government's primary law enforcement agency, takes its obligations and responsibilities regarding the death penalty seriously. The AFP's governance framework provides appropriate safeguards to meet Government intent, while effectively addressing the AFP's transnational operating environment and associated challenges.

In combating transnational crime and protecting the Australian community, the AFP must engage offshore in order to reduce the impacts to Australia and Australians. The AFP cannot limit its cooperation just to countries that have a judicial system or similar policies to that of Australia. Collaboration of this kind has proved to be successful in combatting transnational crime. As highlighted within the submission the AFP must continue to work effectively with international partners around the globe, in order to minimise the impact of criminal activity on Australia and its people.

The AFP's governance framework has evolved over time to meet the changing environment and government expectations. The framework complements legal obligations and Australia's strong opposition to the death penalty and is considered to be robust and appropriate.



AFP National Guideline on international police-to-police assistance in death penalty situations

1. Disclosure and compliance

This document is marked **For Official Use Only** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the AFP National Guideline on information management.

Compliance

This instrument is part of the AFP's professional standards framework. The AFP Commissioner's Order on Professional Standards (CO2) outlines the expectations for appointees to adhere to the requirements of the framework. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth).

2. Acronyms

AFP	Australian Federal Police
MIN	Manager International Network
NMSOC	National Manager Serious and Organised Crime
PNG	Papua New Guinea
PROMIS	Police Real-time Online Management Information System

3. Definitions

Commissioner – means the Commissioner of Police of the AFP, as defined in s. 4 of the AFP Act.

Minister – means the Commonwealth minister responsible for the AFP.

4. Guideline authority

This guideline was issued by the Deputy Commissioner Operations using power under s. 37(1) of the [Australian Federal Police Act 1979](#) (Cth) as delegated by the Commissioner under s. 69C.

5. Introduction

This guideline governs police-to-police assistance in possible death penalty cases, and has been developed in consultation with the Attorney-General's Department.

6. Authority to provide information to foreign law enforcement agencies

The AFP is authorised to provide assistance and cooperate with foreign law enforcement agencies in accordance with the [Australian Federal Police Act 1979](#) (Cth) and Ministerial Direction. Additionally, a number of United Nations Conventions, to which Australia is a signatory, further support the processes of conducting international police cooperation.

This guideline applies only to the provision of assistance, including the sharing of information, which can be provided on a police-to-police basis. This guideline does not apply to the provision of assistance that requires a mutual assistance request. In such cases, s. 8(1A) and s. 8(1B) of the [Mutual Assistance in Criminal Matters Act 1987](#) (Cth) apply. That Act is administered by the Attorney-General's Department.

7. Policy for cooperation with foreign law enforcement agencies

On 29 January 2009, the Attorney-General approved a range of measures to strengthen current policy governing international crime cooperation in death penalty cases.

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
- the degree of risk to the person in providing the information, including the likelihood the death penalty will be imposed.

Assistance after detention, arrest, charge or conviction

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.

Assistance by AFP appointees in Papua New Guinea (PNG)

The Australian Government PNG Death Penalty Framework endorsed by the Attorney-General on 2 June 2014 sets out the whole-of-government approach to managing death penalty issues. Attachment A to that framework applies specifically to AFP appointees in PNG.

8. Approval process

Procedures before detention, arrest, charge or conviction

Where no person has been arrested or detained for, charged with, or convicted of an offence, and the AFP is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty:

Step 1	The case officer or business area seeking assistance approval must complete the 'Assistance in Potential Death Penalty Situations – Approval Request' form (AFP Investigator's Toolkit) and have it endorsed by their functional coordinator. Should assistance be required members should consult the International Operations team and/or Post.
Step 2	The case officer sends the endorsed form via a PROMIS task to International Operations (INTN-OPS) for approval by MIN/NMSOC.

Procedures after detention, arrest charge or conviction

Where a person has been arrested or detained for, charged with, or convicted of an offence carrying the death penalty:

Step 1	<p>The case officer or business area seeking assistance approval prepares a ministerial brief with a covering executive brief to MIN/NMSOC for the attention of the Deputy Commissioner Operations.</p> <p>The ministerial brief should cover the same prescribed factors (listed above) that an AFP delegate must consider.</p>
Step 2	If approved, requests will be progressed to the Attorney-General or the Minister via the AFP Ministerial team.

Procedures for AFP appointees in Papua New Guinea (PNG)

All AFP appointees in PNG must comply with the procedures and approval processes in the Papua New Guinea – Australia Policing Partnership Mission Commander's Orders regarding assistance provided to PNG counterparts in matters involving offences for which the death penalty may be imposed.

9. Reporting

The Commissioner will report to the Minister annually on the nature and number of cases where assistance is provided to foreign law enforcement agencies in death penalty cases.

10. Further advice

Queries about the content of this guideline should be referred to NMSOC.

11. References

- [Australian Federal Police Act 1979](#) (Cth)
- [Mutual Assistance in Criminal Matters Act 1987](#) (Cth)
- Ministerial Direction (AFP Hub)
- Australian Government PNG Death Penalty Framework.

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INFORMATION
PUBLICATION SCHEME

PNG FRAMEWORK – INTERNATIONAL DEPLOYMENT GROUP

APPLICATION OF WHOLE OF GOVERNMENT DEATH PENALTY FRAMEWORK TO AUSTRALIAN FEDERAL POLICE 'FRONTLINE ADVISORY' DEPLOYMENT TO PAPUA NEW GUINEA

Australia has a long-standing policy of opposition to the death penalty. It has abolished the death penalty in Australia and continues to advocate the universal abolition of the death penalty. In line with that policy, this PNG Annexure to the *AFP National Guideline on International Police – to-Police Assistance in Death Penalty Situations* (National Guideline) sets out the whole-of-government approach to managing death penalty issues in PNG for AFP (International Deployment Group) officers deployed to Papua New Guinea (PNG).

The National Guideline will continue to apply to requests for assistance through the International Network, as stated in Part 7. This annexure recognises that the type of assistance to be provided in PNG is different to that usually provided under the National Guideline. The AFP deployees to PNG are in 'frontline advisory' roles and will be providing training and assistance in-country to the RPNGC.

AFP officers deployed to PNG in frontline advisory roles may assist their PNG counterparts in matters involving offences for which the death penalty may be imposed in PNG in the following circumstances:

1) Training

a) General training by the AFP

As part of the deployment to PNG, the AFP will provide general policing training to the RPNGC. Provision of this training by AFP officers does not require approval.

b) 'In situ training' – pre and post-arrest

Regardless of whether a person has been arrested or detained on suspicion of having committed an offence for which the maximum penalty is death, the AFP may provide 'in situ training' and advice to RPNGC (for example, at a crime scene) without requiring approval as the AFP officers do not carry out the pre-arrest activities themselves but rather provide training and guidance to RPNGC counterparts. In these situations, the AFP will ensure there is a written record of the assistance provided.

2) Arrest without warrant in exceptional circumstances

AFP Appointees only have advisor status in PNG, however there may be exceptional circumstances that arise where an AFP Appointee may consider taking action to assist the RPNGC. This is particularly the case when an alleged criminal act takes place in the presence of an AFP Appointee or there is a serious threat to the safety and security of other persons, including AFP Appointees. The AFP Mission Commander in PNG issues a Mission Commander's Order to guide AFP Appointee action in these circumstances.

3) Provision of evidence/assistance – Post-arrest

Where a person has been arrested, detained, charged or convicted of an offence for which the maximum penalty is death, the AFP may provide evidence/assistance if approval is sought only in the following circumstances:

a) Possible that the death penalty may be the sentence

The request will be forwarded to the Attorney-General for decision where the AFP PNG Mission Commander determines there is a possibility that the evidence/assistance to be provided could contribute to the death penalty being sought or imposed.

b) The death penalty is unlikely to be the sentence

The AFP PNG Mission Commander may approve the provision of assistance where the Mission Commander determines there is no possibility that the evidence/assistance to be provided could contribute to the death penalty being sought or imposed.

c) Provision of exculpatory evidence

The AFP PNG Mission Commander may approve the provision of assistance if the Mission Commander is satisfied that the evidence/assistance requested would be exculpatory and would help an offender avoid the death penalty.

The Mission Commander in deciding whether or not to approve assistance in potential death penalty situations for the three categories above, will consider the following factors:

- the purpose of providing the assistance and/or information to be released
- the possibility of the authorities in the foreign country using the assistance and/or information only for that purpose
- the reliability of the information to be released
- whether the assistance and/or information is exculpatory in nature
- nationalities of the persons involved
- the person's age and personal circumstances
- the seriousness of the suspected criminal activity
- the potential risks to the person, and other persons, in not providing the assistance and/or information
- the degree of risk to the person in providing the assistance and/or information, including the possibility the death penalty will be imposed, and
- Australia's interest in promoting and securing cooperation from overseas agencies in combating crime.

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Attachment B

Death Penalty Countries

There are 100 countries that retain the death penalty.

- 35 of these retain the penalty for ordinary crimes but are considered abolitionist in practice.
- 58 retain the death penalty for ordinary crimes.
- 7 have laws that allow the death penalty for crimes under military law or crimes committed under exceptional circumstances¹.

Countries which retain the death penalty for ordinary crimes such as murder can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions.

Countries which retain the death penalty for ordinary crimes but are considered abolitionist in practice

ALGERIA	KENYA	NIGER
BENIN	KOREA (SOUTH)	PAPUA NEW
BRUNEI DARUSSALAM	LAOS	GUINEA
BURKINA FASO	LIBERIA	RUSSIAN
CAMEROON	MADAGASCAR	FEDERATION
CENTRAL AFRICAN REPUBLIC	MALAWI	SIERRA LEONE
CONGO (Republic)	MALDIVES	SRI LANKA
ERITREA	MALI	SURINAME
GHANA	MAURITANIA	SWAZILAND
GRENADA	MONGOLIA	TAJIKISTAN
	MOROCCO	TANZANIA
	MYANMAR	TONGA
	NAURU	TUNISIA
		ZAMBIA

Total: 35

Countries which retain the death penalty for ordinary crimes

AFGHANISTAN	GUINEA	PALESTINIAN
ANTIGUA AND BARBUDA	GUYANA	AUTHORITY
BAHAMAS	INDIA	QATAR
BAHRAIN	INDONESIA	SAINT KITTS & NEVIS
BANGLADESH	IRAN	SAINT LUCIA
BARBADOS	IRAQ	SAINT VINCENT &
BELARUS	JAMAICA	GRENADINES
BELIZE	JAPAN	SAUDI ARABIA
BOTSWANA	JORDAN	SINGAPORE

¹ <http://amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

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CHAD CHINA COMOROS CONGO (Democratic Republic) CUBA DOMINICA EGYPT EQUATORIAL GUINEA ETHIOPIA GAMBIA GUATEMALA	KOREA (North) KUWAIT LEBANON LESOTHO LIBYA MALAYSIA NIGERIA OMAN PAKISTAN	SOMALIA SOUTH SUDAN SUDAN SYRIA TAIWAN THAILAND TRINIDAD AND TOBAGO UGANDA UNITED ARAB EMIRATES UNITED STATES OF AMERICA VIET NAM YEMEN ZIMBABWE
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Total: 58

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances

BRAZIL CHILE	EL SALVADOR FIJI ISRAEL	KAZAKHSTAN PERU
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Total: 7