



**Australian Government**

**Attorney-General's Department**

July 2024

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

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

**Submission – Attorney-General's Department and  
Australian Federal Police**

## Introduction

1. The Attorney-General's Department (the department) and the Australian Federal Police (AFP) welcome the opportunity to provide a submission to the Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (the Committee) as part of its *Inquiry into Australia's efforts to advocate for the worldwide abolition of the death penalty* (the Inquiry).
2. This submission provides an overview of Australia's international legal obligations in relation to the death penalty, and the approach taken to death penalty risks in international crime cooperation matters, including the safeguards which apply to ensure that cooperation occurs only where it is appropriate.
3. Under the terms of references for the Inquiry, the Committee will consider progress against the recommendations in its 2016 report, *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*.<sup>1</sup> In this report, the Committee made two recommendations directed to the department and two recommendations directed to the AFP. These recommendations and the Government response are outlined at **Attachment A**.<sup>2</sup>

## Australia's international legal obligations

4. Australia is a party to the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol Aiming at the Abolition of the Death Penalty. As a result, Australia has an obligation to ensure that no person within its jurisdiction is executed and that State Parties take all necessary measures to abolish the death penalty.
5. Australia also has *non-refoulement* obligations not to remove a person to a country where there is a real risk that the person will be executed.
6. The Australian Government maintains a longstanding bipartisan policy of opposition to the death penalty in all circumstances and for all people, including support for the universal abolition of the death penalty. Australia advocates internationally for the abolition of the death penalty. These advocacy efforts are guided by Australia's Strategy for the Abolition of the Death Penalty (2018), led by the Department of Foreign Affairs and Trade.

## International crime cooperation

7. Australia engages in international crime cooperation with other countries to support criminal investigations and prosecutions both in Australia and overseas. This cooperation is essential to ensuring that criminals cannot escape justice by travelling across national boundaries, and to obtaining evidence that may be held in foreign countries.
8. There are three forms of international crime cooperation:
  - **Mutual assistance:** the process countries use to seek and provide formal government-to-government assistance in criminal investigations and prosecutions, including to obtain evidence in admissible form and to identify and recover proceeds of crime.

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<sup>1</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*, May 2016, [Report – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au/Report-Parliament-of-Australia)

<sup>2</sup> The full Government response is available online: [Government Response – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au/Government-Response-Parliament-of-Australia)

- **Extradition:** the formal government-to-government process by which one country apprehends and sends a person to another country for the purposes of a criminal prosecution or to serve a sentence in that other country.
  - **Police-to-police cooperation:** where law enforcement agencies provide assistance or information at an agency to agency level. This can sometimes occur at the early stage of an investigation, before any person is charged with an offence.
9. Death penalty risks can arise in international crime cooperation matters. Despite the growing trend toward death penalty abolition, Amnesty International reports that 55 countries continue to retain the death penalty.<sup>3</sup> This includes a number of countries which are important partners for Australia from a crime cooperation perspective, including the United States of America, Indonesia, Thailand, Vietnam, India, Malaysia, Singapore, China, the United Arab Emirates, Lebanon and Jordan.
10. In practice, the risk of the death penalty arises rarely in crime cooperation matters, as the death penalty applies only to the most serious offences. However, these risks are taken seriously by agencies in line with Australia's opposition to the death penalty in all circumstances and for all people.
11. There are safeguards in legislation and processes which ensure that cooperation can occur where appropriate to secure criminal justice and national security outcomes while addressing death penalty risks. These safeguards and protections are discussed in the sections below.
12. Australia's international crime cooperation arrangements accord with Australia's position on the death penalty and international obligations, including the obligation under the Second Optional Protocol to the ICCPR to not remove a person to another country where there is a real risk the person may face the death penalty.

## Mutual assistance

13. Australia's framework for mutual assistance is set out in the *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act). Under the Mutual Assistance Act, there are mandatory and discretionary grounds of refusal relating to the death penalty which apply to incoming mutual assistance requests from other countries.
14. Subsection 8(1A) of the Mutual Assistance Act provides a mandatory ground of refusal where a request by a foreign country must be refused if the assistance relates to the investigation, prosecution or punishment of a person for an offence which may attract the death penalty in that foreign country. This ground of refusal applies in circumstances where a person has either been arrested or detained in relation to the offence or charged with, or convicted of, an offence. However, a request for assistance in these circumstances may be granted if the Attorney-General is of the opinion that special circumstances exist.
15. 'Special circumstances' under subsection 8(1A) of the Mutual Assistance Act is not defined, but includes circumstances where the evidence would assist the defence, or where the foreign country provides a credible and reliable diplomatic assurance to not impose or carry out the death penalty.<sup>4</sup> However, it is still open to the Attorney-General to refuse a request after considering a death penalty assurance.
16. Subsection 8(1B) of the Mutual Assistance Act provides the Attorney-General with the discretion to refuse a request for assistance from a foreign country where the Attorney-General believes, in the

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<sup>3</sup> Amnesty International, Death sentences and executions 2023, [www.amnesty.org/en/documents/act50/7952/2024/en](https://www.amnesty.org/en/documents/act50/7952/2024/en)

<sup>4</sup> Explanatory memorandum, Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996, p15.

circumstances of the case, that Australia's provision of assistance may result in the death penalty being imposed on a person.

17. This ground of refusal applies in circumstances where a person has not yet been charged in the relevant foreign country or an investigation has not identified a suspect or suspects. This provides a safeguard covering requests for assistance at the investigation stage, where provision of assistance may lead to the imposition of the death penalty on a person should resultant charges be made, and requires consideration of the interests of international crime cooperation.
18. The Attorney-General is the sole decision-maker with regards to subsections 8(1A) and 8(1B) of the Mutual Assistance Act – these powers have not been delegated.
19. Death penalty risks are also considered in outgoing mutual assistance requests. Before making a request to a foreign country, the department undertakes a detailed risk assessment to consider whether information in a request might allow the other country to commence or further its own investigation or prosecution for a death penalty offence. While the power to make mutual assistance requests to other countries has been delegated to relevant Senior Executive Service and Executive Level 2 officers, the department seeks the Attorney-General's approval to make requests where any death penalty risk is identified.

## Extradition

20. The *Extradition Act 1988* (the Extradition Act) provides the framework for incoming and outgoing requests for extradition. Under the Extradition Act, the Attorney-General has a general discretion whether to receive an extradition request, and whether to surrender a person to a foreign country. In line with Australia's international obligations, the Extradition Act requires the Attorney-General to consider death penalty risks before determining whether to surrender a person in response to an incoming extradition request.
21. Paragraph 22(3)(c) of the Extradition Act provides that the Attorney-General must refuse to surrender a person who is sought for an offence that carries the death penalty, unless the requesting country provides a credible and reliable diplomatic assurance that either:
  - the person will not be tried for the offence
  - if the person is tried for the offence, the death penalty will not be imposed, or
  - if the death penalty is imposed on the person, it will not be carried out.
22. This mandatory ground for refusal implements Australia's non-refoulement obligations under the ICCPR.
23. Where a person elects to waive the extradition process,<sup>5</sup> paragraph 15B(3)(b) of the Extradition Act stipulates that the Attorney-General may only make a surrender determination where satisfied that there is no real risk that the death penalty will be carried out on the person in relation to any offence should they be surrendered to the extradition country.
24. As a matter of practice, in matters with any identified death penalty risk, the department engages with the country seeking extradition at the earliest stage of the process to ascertain their ability and willingness to provide a diplomatic assurance sufficient to satisfy paragraph 22(3)(c) of the Extradition Act. This information is used to inform advice for the Attorney-General's consideration at the

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<sup>5</sup> Under the Extradition Act, a person who consents to being extradited may choose to waive the extradition process, subject to safeguards. As not all stages of the extradition process would be required to be completed, the process is significantly streamlined where a person elects to waive extradition.

first stage of the extradition process on whether to accept receipt of a request under section 16 of the Extradition Act. If a country is unable or unwilling to provide an appropriate diplomatic assurance for death penalty offences, the Attorney-General may not accept the extradition request, noting the mandatory ground of refusal which would be applicable later at the surrender stage.

25. The Full Federal Court decision in *McCrea v Minister for Justice and Customs* [2005] FCAFC 180 sets out the test for an acceptable death penalty diplomatic assurance for the purposes of paragraph 22(3)(c) of the Extradition Act. The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out.'
26. Therefore, the Attorney-General must be satisfied, in both form and substance, that the diplomatic assurance provided means that the death penalty will not be carried out if the person were to be surrendered. Where a diplomatic assurance does not provide that satisfaction, the requirements of paragraph 22(3)(c) of the Extradition Act would not be met and the Attorney-General must refuse the request.
27. The use of death penalty diplomatic assurances is a well-established and commonly accepted practice in international extradition. A breach of a diplomatic assurance would have serious consequences for both Australia's extradition relationship and broader bilateral relationship with the relevant foreign country. Given the public nature of extradition, the Australian Government would become aware of a breach of a death penalty diplomatic assurance.
28. The department has provided information on extradition matters in its annual report since the establishment of the Extradition Act. No breaches of death penalty diplomatic assurances have been recorded to date.

## Police-to-police cooperation

29. The AFP is authorised to provide police services and police support services for the purpose of assisting or cooperating with foreign law enforcement agencies in accordance with section 8 of the *Australian Federal Police Act 1979* and any Ministerial Direction issued under section 39. A number of United Nations Conventions to which Australia is a signatory further support participation in international police cooperation processes.
30. The *AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations* (the AFP National Guideline) outlines the policy and practice safeguards for the AFP to apply in the investigative stage. The AFP National Guideline governs the AFP's approach to police-to-police assistance and cooperation, including information-sharing, in situations where an identified person (regardless of nationality) may be exposed to the death penalty. A copy of the current AFP National Guideline is at **Attachment B**.
31. The AFP National Guideline provides an effective framework for assessing where cooperation is appropriate, to allow the AFP to protect the Australian community from a broad range of criminal activities.
32. The AFP National Guideline is regularly reviewed and updated, with three internal AFP reviews since 2018, which resulted in amendments and refinements.
33. Following the Committee's 2016 report, the AFP National Guideline was amended in 2018 to provide greater clarity and instruction to AFP appointees relating to engagement with, and assistance provided to, foreign law enforcement partner agencies in retentionist countries.

34. In 2021, the AFP National Guideline was reviewed resulting in minor procedural and terminology amendments. These amendments did not reduce or alter accountability or oversight of potential death penalty situations. In August 2022, the AFP National Guideline was updated to remove references to Papua New Guinea, after the PNG Government enacted the Criminal Code (Amendment) Act 2022, which repealed the death penalty for all offences.
35. In 2023, the AFP reviewed the AFP National Guideline and published a new version in early 2024. As part of this update, the level of internal decision-making on death penalty matters was elevated to the Deputy Commissioner International and Specialist Capabilities with oversight by the AFP Sensitive Investigations Oversight Board.
36. The next review of the AFP National Guideline is scheduled to occur in January 2027.

## Conclusion

37. The department and AFP act in accordance with Australia's longstanding opposition to the death penalty when progressing international crime cooperation matters. The department considers that existing safeguards in legislation, policy and processes are effective in identifying and responding to death penalty risks in crime cooperation matters to ensure that cooperation only occurs in appropriate circumstances.
38. The department and the AFP are committed to continuing to review approaches to death penalty matters to ensure they remain effective and to identify opportunities to strengthen existing approaches.

## Attachment A – Recommendations from the 2016 report

### Recommendations for the department

39. In its 2016 report, the Committee made the following two recommendations to the department:

- **Recommendation 1:** That the department conduct a review of the current legislative arrangements for extradition and mutual assistance to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).
- **Recommendation 7:** That the department amend the guidelines governing the Serious Overseas Criminal Matters Scheme and the Special Circumstances Scheme (the Guidelines), and make necessary adjustments to the schemes' operation, to ensure that:
  - legal representatives working pro-bono on death penalty cases can access funding from the schemes in a timely manner;
  - where practical, legal representatives are able to communicate with a specific contact person for the duration of a case; and
  - where necessary due to time restraints, legal representatives have the ability to apply for funding for reasonable expenses already incurred.

40. The Government accepted recommendation 1 and advised the Committee that the department had reviewed the legislative arrangements for extradition and mutual assistance for consistency with Australia's obligations as a Party to the Second Optional Protocol to the ICCPR. The finding of the department's review in 2017 was that the legislative arrangements were consistent with these obligations. This remains the department's view.

41. The Government accepted recommendation 7 and advised the Committee that the department had reviewed the Guidelines and was satisfied they, in combination with the department's practices, achieved the outcome of the recommendation. This remains the department's view.

### Recommendations for the AFP

42. The Committee made the following recommendations to the AFP, which the Government both accepted in part and noted in part (recommendation 2) and did not accept (recommendation 3).

- **Recommendation 2:** That the *AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations* (the AFP National Guideline) be amended to include a stronger focus on preventing exposure of all persons to the risk of the death penalty, by:
  - (a) articulating as its primary aim preventing the exposure of persons to arrest or charge in retentionist countries for crimes that are likely to attract the death penalty
  - (b) explicitly applying the AFP National Guideline to all persons, not just Australian citizens
  - (c) including a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided
  - (d) including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision, and
  - (e) 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 AFP obtain guarantees that prosecutors in partner countries will not seek to apply the death penalty before providing information in relation [to] these crimes. In situations where such guarantees cannot be obtained, the AFP should withhold provision of information that may be relevant to the cases concerned.

43. In response to recommendation 2, the Government noted paragraph (a) above, given that the AFP's primary aim is to enforce Commonwealth criminal law, contribute to combating complex, transnational, serious and organised crime that impacts on national security, as well as protecting Commonwealth interests from criminal activity in Australia and overseas.
44. The Government accepted the recommendation at paragraph (b) above, noting the AFP National Guideline applies to all persons, not just Australian citizens. This position is now reflected in the AFP National Guideline.
45. The Government noted the recommendation at paragraph (c) above, given that foreign law enforcement partners cannot themselves provide binding assurances that the death penalty will not be applied if information is provided.
46. The Government accepted in-principle the recommendation at paragraph (d) above, noting that decision making in the pre-arrest phase is best made within the AFP, and Ministerial approval is currently required to provide information to foreign law enforcement agencies in any case where a person has been arrested or detained for, charged with, or convicted of, an offence which carries the death penalty.
47. The Government accepted the recommendation at paragraph (e) above, and reflected the recommendation in the revised AFP National Guideline.
48. The Government did not accept recommendation 3, noting that the Government does not consider it appropriate to seek, or rely on, an undertaking from prosecutors in partner countries that the death penalty will not be applied. The AFP National Guideline provides the most appropriate way to balance the need for effective cooperation on transnational crime and the commitment to protecting individuals from the death penalty.



# Attachment B – AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations

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

### 1. Disclosure and compliance

This document is classified **OFFICIAL** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the [AFP National Guideline on information management](#).

This instrument forms part of the AFP Governance Instrument Framework (GIF) as defined in the [AFP Commissioner's Order on governance \(CO1\)](#). The [AFP Commissioner's Order on professional standards \(CO2\)](#) and [AFP Commissioners Order on security \(CO9\)](#) set the framework for the conduct expected of AFP appointees through obligations and best practice to help maintain the safety and security of AFP information, operations, assets and people. Inappropriate departures from the provisions outlined within AFP governance instruments may constitute a breach and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth).

### 2. Guideline authority

This guideline was issued by the Deputy Commissioner International and Specialist Capabilities using power under s. 37(1) of the [AFP Act](#) as delegated by the Commissioner under s. 69C.

### 3. Introduction

This guideline governs police-to-police assistance and cooperation, including sharing information, in situations where an identified person/s, regardless of nationality, may be exposed to the death penalty. The guideline helps control AFP [Enterprise risks](#) (2, 3, 4 and 5) as well as risks to the AFP emanating from police cooperation in a death penalty context, notwithstanding the Australian Government opposes the death penalty in all circumstances for all people, and supports the universal abolition of the death penalty. Australia's approach to government-to-government assistance or police cooperation in a death penalty context are governed by this Guideline, the Extradition Act 1988 (Cth) and the Mutual Assistance in Criminal Matters Act 1987 (Cth). The AFP maintains ongoing close engagement on death penalty matters with the Attorney-General's Department and the Department of Foreign Affairs and Trade.

The AFP's primary aim is to enforce Commonwealth criminal law, contribute to combating complex, transnational, serious and organised crime that impacts on the Australian community and Australia's national interests. The AFP collaborates with national and international partners to enhance safety and provide a more secure regional and global environment. To achieve this aim, the AFP cooperates with foreign police and law enforcement agencies consistent with Government policy in relation to crimes that attract the death penalty.

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### 4. Authority to provide information to foreign law enforcement agencies

The AFP is authorised to provide police services and police support services for the purpose of assisting or cooperating with foreign law enforcement agencies in accordance with the [AFP Act](#) and the [Ministerial Direction](#). Additionally, a number of United Nations Conventions, to which Australia is a signatory, further support the processes of international police cooperation.

This guideline applies only to assistance, including the sharing of information and cooperation 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 AGD.

### 5. Policy for cooperation with foreign law enforcement agencies

In May 2016, the Joint Standing Committee on Foreign Affairs, Defence and Trade in its report: *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*, made recommendations in relation to the AFP National Guideline on international police-to-police assistance in death penalty situations.

This guideline has been updated to reflect the Australian Government response to the Joint Standing Committee's recommendations.

### 6. Role of the Sensitive Investigations Oversight Board for Death Penalty Requests

Matters involving the Death Penalty are deemed *sensitive* as per the [AFP National Guideline on sensitive investigations](#).

The SIOB is a strategic oversight body for AFP investigations determined to be sensitive investigations, as defined within that guideline.

All Death Penalty requests whether pre or post arrest require SIOB oversight and decision by the relevant Deputy Commissioner as the appropriate delegate.

(For further details on sensitive investigations and related considerations, refer to the [AFP National Guideline on sensitive investigations](#) and the [SIOB Terms of Reference](#).)

### 7. Provision of assistance and cooperation

#### 7.1 Assistance and cooperation before detention, arrest, charge or conviction (pre-arrest)

If an AFP appointee is aware the provision of assistance to, or cooperation with, a foreign law enforcement agency is likely to result in an identified person/s, regardless of nationality, being detained, arrested, charged or prosecuted for an offence carrying the death penalty, the AFP appointee must complete and submit an [Assistance in Death Penalty Situations Approval Request Form](#) for consideration by CIE.

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CIE must provide initial advice and determine the risk category based on the relevant factors detailed in section 7.2 of this guideline. The Death Penalty request must then go from CIE to the SIOB via the relevant International Assistant Commissioner, irrespective of the risk category.

The cleared request, should contain pertinent information for the SIOB to consider, meaningfully discuss, and assess the relevant risks. Requests must be submitted to the SIOB Secretariat via s 47E(d)

### 7.2 Relevant factors

CIE must determine the Death Penalty Request Risk Category, taking into consideration relevant factors, including:

1. the purpose of providing the assistance
2. the seriousness of the suspected criminal activity
3. the investigation plan and strategy
4. whether the assistance is exculpatory in nature
5. the extent to which the death penalty is imposed and carried out in the relevant foreign country
6. the reliability of any information to be released
7. the nature of the AFP's relationship with the relevant foreign country and level of confidence in the foreign police or law enforcement agency using the assistance only for the purpose for which the assistance was sought and/or provided
8. the age and personal circumstances of the person/s who is/are the target of the investigation
9. the level of risk for the person, associated with provision of the information, including the likelihood the death penalty will be imposed
10. the level of risk to any potential victim/s, associated with providing or not providing the assistance
11. the level of risk to other persons, associated with providing or not providing the assistance, including the public safety risk
12. Australia's interest in promoting and securing cooperation from the foreign police or law enforcement agency in combatting crime.

### 7.3 Death Penalty Request Risk Category and Authorised Approving Delegate

The SIOB considers the Death Penalty Request against relevant factors as per section 7.2 of this guideline in conjunction with the considerations of CIE to determine if the AFP will provide assistance or cooperate with a foreign law enforcement agency in death penalty situations:

#### Low Risk Category

Involves the provision of assistance to, including the release of information, or cooperation with, a foreign law enforcement agency where the nature of the investigation is such that there are few confirmed facts or details about the suspected criminal conduct. The provision of assistance in such matters is generally for the purpose of identifying possible lines of inquiry to assist investigations in Australia and/or in other countries, or to promote the commencement of an investigation overseas.



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Examples of information that may be shared in low risk releases include: details of a consignor and/or consignee, call charge records, telecommunication subscriber checks, criminal records, operational intelligence, movement checks, financial records, and personal indices.

### Medium Risk Category

Involves the provision of assistance to, including the release of information, or cooperation with, a foreign law enforcement agency which is likely to result in the identification of an offender who may be detained, arrested, charged or prosecuted for a death penalty offence or the immediate detection of criminal offences which may carry the death penalty.

It includes requests where direct contact, overt or covert is sought, such as surveillance or undercover operations.

### High Risk Category

Involves the release of significant inculpatory information or the provision of assistance to a foreign law enforcement agency which is likely to be used in or to lead to the detention, arrest, charge or prosecution of an identified person/s for a death penalty offence.

In some instances, the AFP may release information assessed as 'high risk' to a foreign law enforcement agency because the delegate considers the release necessary to prevent a serious offence to a person, to protect an innocent agent, or to prevent significant harm to society.

#### 7.4 Assistance after detention, arrest, charge or conviction (post-arrest)

Post-arrest is considered any case in which an identified person/s, regardless of nationality, has been arrested or detained for, charged with, or convicted of, an offence which carries the death penalty. All post-arrest Death Penalty Requests require a Ministerial Brief to be prepared for SIOB endorsement prior to Ministerial approval. CIE must provide initial advice and determine the risk category based on the relevant factors detailed in section 7.2 of this guideline.

The Ministerial Brief must contain pertinent information for the SIOB and subsequently the Minister to consider, meaningfully discuss and assess against the relevant risks. The Ministerial Brief and supporting material must be submitted to the SIOB Secretariat, once cleared via the relevant International Assistant Commissioner.

#### 8. When SIOB delegation is not required

If an AFP appointee has considered a potential death penalty situation in accordance with this guideline, and has determined that it is **not likely** the provision of assistance to, or cooperation with, a foreign law enforcement agency will result in an identified person/s, regardless of nationality, being detained, arrested, charged or prosecuted for an offence carrying the death penalty, the appointee must make an accountable AFP record (eg diary, email, PROMIS) of that decision. That decision must be reviewed and endorsed by the relevant specialised or regional commander.

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### 9. Death Penalty Request process

#### 9.1 Procedures before detention, arrest, charge or conviction (pre-arrest)

Where no person/s has been detained or arrested for, charged with, or convicted of an offence, and an AFP appointee is aware that the provision of assistance will likely result in the prosecution of an identified person/s for an offence carrying the death penalty, the following steps must be followed:

<b>Step 1</b>	Following consultation with the relevant AFP International Post, the case officer seeking assistance approval must complete the 'Assistance in Death Penalty Situations Approval Request Form' (DPR) in consultation with IC-OET via s 47E(d). This also includes completion of Attachment A within the DPR which details the assistance to be provided.
<b>Step 2</b>	Regional superintendent or SO (for requests originating from Post) endorses the DPR through the relevant specialised commander/regional commander and submits to s 47E(d).
<b>Step 3</b>	IC-OET reviews the DPR, liaises with the relevant Command and submits to SIOC.
<b>Step 4</b>	SIOC reviews the DPR and submits to CIE for review.
<b>Step 5</b>	CIE must provide initial advice and determine the risk category based on the relevant factors detailed in section 7.2 of this guideline.
<b>Step 6</b>	CIE must provide the DPR to the relevant International Assistant Commissioner.
<b>Step 7</b>	Once cleared by the relevant International Assistant Commissioner, the DPR is submitted to SIOB via s 47E(d). The SIOB considers the DPR and makes the decision.
<b>Step 8</b>	Documentation for the approved DPR is returned to the relevant Command for actioning in conjunction with the relevant AFP Post.  Non-approved DPRs are returned to the relevant Command.

#### 9.2 Procedures following detention, arrest, charge or conviction (post-arrest)

Where a person has been arrested or detained for, charged with, or convicted of, an offence carrying the death penalty, the following steps must be followed, before the provision of assistance:

<b>Step 1</b>	Following consultation with the relevant AFP International Post and IC-OET, the case officer seeking assistance approval must prepare a Ministerial Brief.  The Ministerial Brief should address the relevant factors (as detailed in s. 7.2. of this guideline) that are required to be considered by the SIOB. The Ministerial Brief and supporting material must be submitted to CIE.
<b>Step 2 (a)</b>	CIE consults with the relevant DFAT Regional Division Head and the AGD Treaties Division.
<b>Step 2 (b)</b>	Concurrent to Step 2 (a) the relevant SO consults with the relevant DFAT Head of Mission.
<b>Step 3</b>	Following consultation and input from DFAT and AGD, CIE submits the Ministerial Brief to the relevant International Assistant Commissioner.
<b>Step 4</b>	Once cleared by the relevant International Assistant Commissioner, the Ministerial Brief is submitted to SIOB via s 47E(d).

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<b>Step 5</b>	If the Ministerial Brief is approved by the SIOB, it is progressed to the Minister via the AFP Ministerial Team.
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### 10. Reporting

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

International Command Americas, Africa, Middle East & Europe is responsible for mandatory reporting required to the Minister on the nature and number of cases where assistance is provided to foreign law enforcement agencies in death penalty cases.

### 11. Further advice

Enquiries in relation to the content of this guideline should be referred to s 47E(d) via s 47E(d)

### 12. References

#### Legislation

- [Australian Federal Police Act 1979](#) (Cth)
- [Mutual Assistance in Criminal Matters Act 1987](#) (Cth)

#### AFP governance instruments

- AFP Commissioner's Order on governance (CO1)
- AFP Commissioner's Order on professional standards (CO2)
- AFP Commissioner's Order on security (CO9)
- AFP National Guideline on information management
- AFP National Guideline on sensitive investigations

#### Other sources

- Sensitive Investigations Oversight Board Terms of Reference
- Assistance in Potential Death Penalty Situations
- Better Practice Guide on Ministerial Briefings for Investigations
- Ministerial Direction
- Assistance in Potential Death Penalty Situations – Approval Request Form
- SIOB Briefing Paper – Death penalty request

### 13. Shortened forms

<b>AFP</b>	Australian Federal Police
<b>AGD</b>	Attorney-General's Department
<b>CIE</b>	Commander International Engagement
<b>DFAT</b>	Department of Foreign Affairs and Trade
<b>DPR</b>	Death Penalty Request
<b>DPR Form</b>	Death Penalty Request Form
<b>GIF</b>	Governance Instrument Framework

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<b>IC - OET</b>	International Command - Operational Engagement Team
<b>SIOB</b>	Sensitive Investigations Oversight Board
<b>SIOC</b>	Superintendent International Operations Centre
<b>SO</b>	Senior Officer

\*Relevant International Assistant Commissioner means either Assistant Commissioner Pacific Asia or Assistant Commissioner Americas, Africa, Middle East and Europe

### 14. Definitions

**AFP appointee** means a deputy commissioner, AFP employee, special member or special protective service officer and includes a person:

- engaged under section 35 of the AFP Act as a consultant or contractor to perform services for the AFP and determined under section 35(2) of the AFP Act to be an AFP appointee
- engaged overseas under section 69A of the AFP Act
- seconded to the AFP under section 69D of the AFP Act.

(See section 4 of the AFP Act.)

**Commissioner** means the Commissioner of Police of the AFP, as defined in s. 4 of the [AFP Act 1979](#).

**Delegate** means the AFP appointee authorised as an approving delegate, as detailed in s. 6 of this guideline.

**Death Penalty Risk Category** is the risk category (low, medium or high) of the request to assist, or cooperate with, a foreign law enforcement agency in a death penalty situation, as determined by CIE following the assessment of the request and consideration of the relevant factors as detailed in s. 7.2 and the risk categories as detailed in s. 7.3 of this guideline.

**Death Penalty Situation** means a situation in which AFP appointees are considering sharing information with, or providing cooperation with, a foreign jurisdiction in relation to an identified individual that could result in the application of the death penalty being imposed by that foreign jurisdiction.

**Minister** means the Commonwealth Minister responsible for the AFP.

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