

## Australia and the death penalty

- 3.1 Australia has a politically bipartisan stance against the death penalty, which is represented in laws and practices relating to criminal justice, extradition and the formal assistance it provides to foreign countries.
- 3.2 This chapter outlines Australia's domestic position in relation to capital punishment, looking at:
- Australia's domestic legal and political position;
  - the laws and practices surrounding extradition, as they relate to the death penalty;
  - the laws and practices surrounding mutual assistance, as they relate to the death penalty; and
  - an analysis of Australia's international obligations as an abolitionist country and a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

### Australia's domestic position

- 3.3 Capital punishment is comprehensively outlawed in Australia. The Law Council of Australia (LCA) and the Australian Bar Association (ABA) explained that:

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.<sup>1</sup>

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<sup>1</sup> Law Council of Australia (LCA) and the Australian Bar Association (ABA), *Submission 24*, p. 4.

- 3.4 In 2010, the *Death Penalty Abolition Act 1973* (Cth) was amended to provide that the death penalty 'must not be imposed as the penalty for any offence' in Australia, including the State and Territory jurisdictions.<sup>2</sup>
- 3.5 The LCA and ABA submitted:
- Queensland was the first to abolish the death penalty for all crimes in 1922; New South Wales was the last in 1985. In 2010, with bipartisan support, the Commonwealth Parliament passed legislation to foreclose the possibility of any individual State jurisdiction reintroducing the death penalty.<sup>3</sup>
- 3.6 Former Senator Gary Humphries told the inquiry about the impetus for this law, saying that prior to 2010:
- ... there was no legal impediment for any one of the jurisdictions concerned to bring it back in certain circumstances, and we felt it was appropriate to take some steps to ensure that that process could not be reversed. Our focus was on a program to get states to refer their powers over the death penalty to the Commonwealth parliament and have the Commonwealth parliament, with the referral of powers, legislate for the whole country.<sup>4</sup>
- 3.8 Dr Amy Maguire, Ms Holly Fitzsimmons and Mr Daniel Richards quoted former Attorney-General, the Honourable Robert McClelland MP, whose second reading speech contended:
- Such a comprehensive rejection of capital punishment will also demonstrate Australia's commitment to the worldwide abolitionist movement and complement Australia's international lobbying efforts against the death penalty.<sup>5</sup>
- 3.9 Mr Humphries explained that the law was ultimately passed by the Rudd government in 2010 using 'the foreign affairs power':
- It legislated using the Second Option Protocol to the International Covenant on Civil and Political Rights, and, when it did so, it did so with barely a murmur of dissent.<sup>6</sup>
- 3.10 Despite almost universal opposition to the death penalty among Australia's politicians, there are occasional calls for reintroduction, though these are few and far between.

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2 *Death Penalty Abolition Act 1973* (Cth), s. 6.

3 LCA and ABA, *Submission 24*, p. 4.

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

5 Dr Amy Maguire, Ms Holly Fitzsimmons and Mr Daniel Richards, *Submission 40*, p. 2; see also House of Representatives *Hansard*, 19 November 2009, p. 12197.

6 Mr Humphries, *Committee Hansard*, Canberra, 27 November 2015, p. 43.

- 3.11 In November 2015, Queensland State MP Christian Rowan called for a debate on reinstating the death penalty in Australia, in response to the issue of terrorism.<sup>7</sup> His call was not supported by the Queensland Liberal National Party, of which he was a member.<sup>8</sup>
- 3.12 When asked if they intended to respond to this call, Reprieve Australia told the Committee that their organisation discussed the MP's call and chose to ignore it, rather than making any formal statements, as they 'did not want to give it oxygen'.<sup>9</sup>

### Popular views in Australia

- 3.13 There was some debate among witnesses as to the views of the Australian public on capital punishment.
- 3.14 Civil Liberties Australia (CLA) argued:  
... there is a rump group in Australia, and surveys show this to be around 45 to 55 per cent depending on what particularly horrendous killing has just occurred, that would reintroduce the death penalty if it were possible in Australia, even though it practically is not possible.<sup>10</sup>
- 3.15 CLA further stated that support for the death penalty among Australians increased between 2009 and 2015. This claim is based on a comparison of two Roy Morgan polls on capital punishment.<sup>11</sup>
- 3.16 The first poll, conducted in 2009, found that 64 per cent of Australians believed the penalty for murder should be imprisonment, and 23 per cent believed it should be the death penalty.<sup>12</sup>
- 3.17 The comparison poll, conducted in 2014, asked for people's views regarding the death penalty for terrorist attacks resulting in death, rather than 'murder'. This poll found that 52.5 per cent of respondents 'favour the death penalty for deadly terrorist attacks in Australia', and 47.5 per

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7 Ms Emily Howie, Director of Advocacy and Research, Human Rights Law Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 15.

8 Ms Gail Burke, 'Queensland MP Christian Rowan calls for debate on reinstating the death penalty in Australia', *ABC News online*, 12 November 2015, at <[www.abc.net.au/news/2015-11-12/lnp-mp-christian-rowan-calls-death-penalty-in-australia/6935954](http://www.abc.net.au/news/2015-11-12/lnp-mp-christian-rowan-calls-death-penalty-in-australia/6935954)> viewed 13 April 2016.

9 Ms Sally Warshaft, Vice-President, Reprieve Australia, *Committee Hansard*, Melbourne, 17 November 2015, p. 17.

10 Mr William Murray Rowlings, Chief Executive Officer, Civil Liberties Australia *Committee Hansard*, Canberra, 27 November 2015, p. 9.

11 Civil Liberties Australia (CLA), *Answer to Questions on Notice No. 1*, p. [1].

12 'Australians say penalty for murder should be Imprisonment (64%) rather than the Death Penalty (23%)', *Roy Morgan Research*, 27 August 2009, at <[www.roymorgan.com.au/findings/finding-4411-201302260051](http://www.roymorgan.com.au/findings/finding-4411-201302260051)> viewed 13 April 2016.

cent do not. The question asked was: 'If a person is convicted of a terrorist act in Australia which kills someone should the penalty be death?'<sup>13</sup>

- 3.18 The two polls being compared asked very different questions, with one referring to 'murder' and the other to 'a terrorist act'.
- 3.19 Professor Gregory Craven (Vice Chancellor, Australian Catholic University) offered the opinion that, in relation to public polling, the death penalty is 'a classic push-poll type policy area'. He asserted:
- If you set up polls that say, 'Is terrorism the greatest problem facing the world; do you absolutely loathe the people who kill for terror; do people who kill for terror deserve to get a corresponding punishment; are you in favour of the death penalty?' then you are going to go quite a long way towards getting an answer.<sup>14</sup>
- 3.20 Notably, the earlier 2009 poll also asked for respondents' views on the imposition of the death penalty for drug trafficking in overseas jurisdictions, and 50 per cent of respondents agreed that 'If an Australian is convicted of trafficking drugs in another country and sentenced to death, the penalty should be carried out', while 44 per cent answered that the death penalty 'should not be carried out' and 6 per cent answered that they 'can't say'.<sup>15</sup>
- 3.21 Professor Craven argued that policy makers must be vigilant to ensure popular consensus does not shift to support for the death penalty. He remarked:
- I have always been concerned at the ease with which discourse in Australia could or can very easily slip back into support for the death penalty. We commonly tell ourselves that in Australia this could never happen again. But there is a natural knee-jerk reaction if cases are bad enough, if they involve child abuse or terrorism, for example, that people will very quickly consider the possibility of capital punishment. My view is that the reason it does not get anywhere is not necessarily because that is the popular view but that there is, if you like, an aristocratic consensus at the policy-[class] level that prevents it.<sup>16</sup>

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13 'Small majority of Australians favour the death penalty for deadly terrorist acts in Australia', *Roy Morgan Research*, 27 August 2009, at <[www.roymorgan.com/findings/5814-death-penalty-for-terrorist-acts-september-19-2014-201409190533%20](http://www.roymorgan.com/findings/5814-death-penalty-for-terrorist-acts-september-19-2014-201409190533%20)> viewed 13 April 2016.

14 Professor Craven, ACU, *Committee Hansard*, Sydney, 9 December 2015, p. 21.

15 'Australians say penalty for murder should be Imprisonment (64%) rather than the Death Penalty (23%)', *Roy Morgan Research*, 27 August 2009.

16 Professor Gregory Joseph Craven, Vice-Chancellor, Australian Catholic University (ACU), *Committee Hansard*, Sydney, 9 December 2015, p. 18.

3.22 Witnesses including CLA<sup>17</sup> and Professor Craven proposed that there is still a need to educate the Australian public, to ensure broad-based support for country's abolitionist stance. Professor Craven said:

If you do not have the Australian public behind a position against the death penalty then overseas efforts, I think, are going to be fruitless.<sup>18</sup>

## Extradition

3.23 The Attorney General's Department is responsible for extradition in Australia. The Department describes extradition as 'the process by which one country apprehends and sends a person to another country to face criminal charges or serve a sentence'.<sup>19</sup>

3.24 The United Nations Office of the High Commissioner for Human Rights (OHCHR) stated that international law prohibits extradition in cases where the death penalty is a genuine risk:

This prohibition of non-refoulement primarily derives from the prohibition of torture, cruel inhuman and degrading treatment and punishment contained in Article 7 of ICCPR. It is also enshrined in Article 3 of the Convention against Torture. In accordance with international human rights jurisprudence, this prohibition should take precedence over specific bilateral extradition treaties or other agreements, such as on mutual assistance in criminal matters.<sup>20</sup>

3.25 Australia also has its own law, which is vocal on the issue of the death penalty and provides significant protections. Ms Catherine Hawkins (First Assistant Secretary, International Crime Cooperation Division, Attorney-General's Department) explained:

The Extradition Act 1988 does not allow for the extradition of a person where the offence is subject to the death penalty unless an undertaking is provided that the death penalty will not be imposed, or, if it is imposed, that it will not be carried out. In cases

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17 Mr Rowlings, Civil Liberties Australia, *Committee Hansard*, Canberra, 27 November 2015, p. 9.

18 Professor Craven, ACU, *Committee Hansard*, Sydney, 9 December 2015, p. 18.

19 Attorney General's Department (AGD), *Fact sheet 2 - Overview of the Extradition Process*, at <[www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Extradition/Documents/Factsheet%20Overview%20of%20the%20Extradition%20Process.pdf](http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Extradition/Documents/Factsheet%20Overview%20of%20the%20Extradition%20Process.pdf)> viewed 13 April 2016.

20 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Submission 49*, p. [4].

where a person elects to waive extradition, the Attorney-General must be satisfied that, on return to the requesting country, there is no real risk that the death penalty will be carried out upon the person in relation to that offence.<sup>21</sup>

3.26 The *Extradition Act 1988* (Cth) was amended in 2012 to add additional safeguards where there is a risk of a person being subject to the death penalty or torture:

The Attorney-General may only determine that the person be surrendered to the extradition country concerned if:

- (a) the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture; and
- (b) the Attorney-General is satisfied that, on surrender to the extradition country, there is no real risk that the death penalty will be carried out upon the person in relation to any offence.<sup>22</sup>

3.27 The Minister said these amendments were intended to ensure that ‘terminology used in our domestic regime mirrors our international obligations’.<sup>23</sup> The overall purpose of the amendments was to:

...streamline and modernise the process for extradition, and to ensure Australian authorities can offer a comprehensive range of assistance to our international criminal justice partners.<sup>24</sup>

3.28 Before being enacted, the Bill was reviewed by the House Standing Committee on Social Policy and Legal Affairs, which stated that the legislation sought to ‘strengthen safeguards in relation to the provision of assistance where there are death penalty or torture concerns in a particular case’.<sup>25</sup>

3.29 Witnesses to the current inquiry were broadly satisfied that the Extradition Act provides the necessary safeguards to prevent refoulement in death penalty cases.<sup>26</sup>

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21 Ms Catherine Hawkins, First Assistant Secretary, International Crime Cooperation Division, Attorney-General’s Department (AGD), *Committee Hansard*, Canberra, 27 November 2015, p. 33.

22 *Extradition Act 1988* (Cth) s. 15B (3).

23 *Senate Hansard*, 21 September 2011, p. 6739.

24 *Senate Hansard*, 21 September 2011, p. 6738.

25 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 5.

26 See for instance: Human Rights Law Centre, *Submission 39*, p. 1; LCA and ABA, *Submission 24*, p. 14.

3.30 However, the United Nations Office of the High Commissioner for Human Rights (OHCHR) expressed concerns that the Act allows Australia to 'assist a retentionist country if the latter provides an assurance that the death penalty will not be carried out against the accused'. The OHCHR further observed:

The Federal Court of Australia has ruled that such assurance 'does not need to be legally enforceable', which would therefore allow a requesting country manipulating, backtracking or even ignoring its own assurances.<sup>27</sup>

3.31 The AGD's Ms Hawkins argued that the current process is effective and provides sufficient protections. She asserted:

Australia has effective relationships with a number of countries which retain the death penalty including the United States of America and Singapore. In the course of multiple extraditions over many years countries have provided death penalty undertakings to secure extradition for offences which carry the death penalty. Our experience is that those death penalty undertakings have been honoured.<sup>28</sup>

## Mutual assistance

3.32 Mutual assistance is 'the formal Government to Government process by which countries assist each other in the investigation and prosecution of criminal offences'.<sup>29</sup> Mutual assistance can also be used to recover proceeds of crime.<sup>30</sup>

3.33 Importantly, mutual assistance is 'separate from police-to-police and agency-to-agency assistance and other forms of informal assistance',<sup>31</sup> and as such is discussed separately from the issue of police-to-police information sharing, which is addressed in Chapter 4 of this report.

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27 OHCHR, *Submission 49*, p. [6].

28 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

29 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 3.

30 AGD, 'Mutual Assistance', AGD website, at <[www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx](http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx)> viewed 13 April 2016.

31 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 5.

3.34 The following figure describes the difference between mutual assistance and police-to-police assistance in a murder case:

Figure 3.1 Difference between mutual assistance and police-to-police assistance



Source Attorney General's Department, 'Mutual Assistance', AGD website.<sup>32</sup>

3.35 Australia's requests for mutual assistance are made by the Attorney-General and Minister for Justice, generally on behalf of a law enforcement agency, prosecuting agency, or a defendant in a criminal matter. Australia also receives requests from other countries in a 'reciprocal process'.<sup>33</sup>

3.36 Australia's mutual assistance processes are governed by the *Mutual Assistance in Criminal Matters Act 1987*. Section 8 of the Act was amended in 2012:

(1) A request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Attorney-General:

...

(ca) there are substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to torture;

32 AGD, 'Mutual Assistance', AGD website, at <[www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx](http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/MutualAssistance/Pages/default.aspx)> viewed 13 April 2016.

33 AGD, 'Mutual Assistance', AGD website.

...

(1A) A request by a foreign country for assistance under this Act must be refused if:

- (a) the request relates to the investigation, prosecution or punishment of:
  - (i) a person arrested or detained on suspicion of having committed an offence; or
  - (ii) a person charged with, or convicted of, an offence; and
- (b) the offence is one in respect of which the death penalty may be imposed in the foreign country;

unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.<sup>34</sup>

3.37 When introducing the amendments, the Minister said:

This will ensure the mandatory ground of refusal for death penalty offences applies regardless of whether formal charges have been laid.<sup>35</sup>

3.38 Further, the amendments included:

...an express mandatory ground for refusal where there are substantial grounds to believe the provision of the assistance would result in a person being subjected to torture.<sup>36</sup>

3.39 Ms Hawkins confirmed that the Act provides 'grounds for refusal in mutual assistance cases', with these grounds including exposure to the death penalty. She explained:

... in situations where a person has been charged, arrested, detained or convicted of an offence that could result in the death penalty, the act provides that mutual assistance must be refused unless there are special circumstances.<sup>37</sup>

3.40 While 'special circumstances' are not defined in the Act, Ms Hawkins provided these examples: 'the provision of exculpatory evidence', or where 'the foreign country has provided an undertaking that they would not carry out the death penalty'.<sup>38</sup>

3.41 Ms Hawkins also clarified that the Act provides discretion for the Attorney-General to refuse assistance in circumstances where 'no person

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34 *Mutual Assistance in Criminal Matters Act 1987* (Cth), s. 8.

35 *Senate Hansard*, 21 September 2011, p. 6740.

36 *Senate Hansard*, 21 September 2011, p. 6740.

37 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

38 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

has yet been charged, arrested, detained or convicted of a death penalty offence'. Further:

The Attorney-General may refuse assistance if he or she believes that the assistance may result in the death penalty being imposed and, after taking into account the interests of international cooperation, is of the opinion that, in the circumstances of the case, the request should not be granted.<sup>39</sup>

- 3.42 Very few witnesses commented on Australia's mutual assistance regime. However, the LCA and ABA proposed a change to the legislation, arguing:

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.<sup>40</sup>

- 3.43 The OHCHR was also concerned that 'special circumstances' is not defined in the Act, suggesting this could give the Attorney-General too much discretion.<sup>41</sup>

- 3.44 An inquiry into the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (to amend the Extradition Act and Mutual Assistance Act) was conducted by the House Standing Committee on Social Policy and Legal Affairs in 2011. The Committee recognised that there was reliance in the legislation on 'assurances' provided by foreign countries in exchange for information, saying this 'raises questions about the monitoring and enforcement schemes in place in relation to undertakings', though the Committee did *not* recommend defining 'special circumstances' in the Act.<sup>42</sup>

- 3.45 The Committee did recommend that 'if the Minister for Justice or the Attorney-General becomes aware of a serious breach of an undertaking, this breach should immediately be reported to the Parliament'.<sup>43</sup>

- 3.46 The Committee also recommended that the Attorney General's Department 'conduct a review of the operations of the amendments

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39 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.

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

41 OHCHR, *Submission 49*, pp. [5-6].

42 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 36.

43 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 37.

contained in the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, within three years of its enactment.<sup>44</sup>

## Australia's international obligations

3.47 Witnesses submitted that Australia has certain international obligations as an abolitionist nation, and as a signatory to the Second Optional Protocol to the ICCPR.

3.48 Dr Bharat Malkani (University of Birmingham) asserted:

Not only do states that have abolished the death penalty have political and moral obligations to refrain from aiding and assisting the use of the death penalty elsewhere, they may also have legal obligations in some circumstances.<sup>45</sup>

3.49 The ICCPR forbids abolitionist states from facilitating executions in foreign countries. This is articulated in *General Comment No. 31*, which states:

... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>46</sup>

3.50 The OHCHR also noted the existence of jurisprudence whereby collaboration between abolitionist and retentionist states, which leads to an execution, would broaden responsibility beyond the executing state.<sup>47</sup>

3.51 In 2012 the Special Rapporteur on extrajudicial, summary or arbitrary executions reported to the UN General Assembly:

Where the death penalty is imposed in violation of international standards, this assistance may amount to complicity and should

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44 House Standing Committee on Social Policy and Legal Affairs, *Advisory report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011*, p. 42.

45 Dr Bharat Malkani, University of Birmingham, *Submission 4*, p. 4.

46 ICCPR Human Rights Committee, *General Comment No. 31*, 'The Nature of the Legal Obligation Imposed on States Party to the Covenant', document CCPR/C/21/Rev.1/Add.13, p. 5.

47 UN Office of the High Commissioner of Human Rights, *Submission 49*, pp. 2-3.

lead to indirect legal or other responsibility on the part of the assisting party.<sup>48</sup>

3.52 Furthermore, as an overarching principle, the Special Rapporteur reported:

States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition.<sup>49</sup>

3.53 A submission from Monash University's Castan Centre for Human Rights Law (Castan Centre) suggested that cooperation leading to an execution could be regarded as a breach of treaty obligations:

So far, the jurisprudence has addressed extradition, deportation and other forms of removal in this context, but we would argue that official cooperation foreseeably leading to the imposition of the death penalty should logically also be encompassed by this rule, particularly where it concerns people for whom a State has specific responsibility, such as citizens and permanent residents.<sup>50</sup>

3.54 Mr Adam Fletcher (Research Fellow, Castan Centre) submitted:

There is some disagreement as to how far that obligation extends. There is some argument over the jurisdictional scope of the ICCPR ... It is for the state to interpret its obligations, but it is good for jurisprudence to be consistent internationally, and the Human Rights Committee are the leading experts.<sup>51</sup>

3.55 Ms Sarah Gill observed that:

The International Commission of Jurists notes three requisite milestones for a country to be genuinely abolitionist: abolition of the death penalty in domestic law; non-refoulement of people to jurisdictions where they may face the death penalty; and a refusal to provide international police cooperation in death penalty situations.<sup>52</sup>

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48 'Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General', 9 August 2012, document A/67/275; p.14. See also: OHCHR, *Submission 49*, p. 2. The Special Rapporteur noted that transferring a person may be lawful where 'adequate and reliable' diplomatic assurances are provided.

49 'Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General', 9 August 2012, document A/67/275, p.16.

50 Castan Centre for Human Rights Law (Castan Centre), *Submission 9*, p. 3.

51 Mr Adam Fletcher, Research Fellow, Castan Centre, *Committee Hansard*, Melbourne, 17 November 2015, p. 25.

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

- 3.56 The Castan Centre contended that Australia needs to show consistency in its formulation of international treaty agreements to ensure this obligation is reflected:

Australia's bilateral treaties regarding mutual assistance in criminal matters generally contain some internationally accepted safeguards, such as the right of refusal to cooperate where the request relates to a political or military offence. ... However, in the two most recent of these treaties (with India and the [United Arab Emirates]), the death penalty is mentioned specifically only in one (with the UAE), which seems inconsistent given both countries retain capital punishment for a range of crimes. Australia made clear in agreed minutes of negotiations for the equivalent treaty with China that 'imposition of the death penalty may be in conflict with the essential interests of Australia,' but the actual words 'death penalty' do not appear in the text of the treaty.<sup>53</sup>

- 3.57 The Castan Centre further recommended including references to international human rights law in the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, and the *AFP National Guideline on international police-to-police assistance in death penalty situations*. It argued:

This would help to make it clear that the Australian Government takes its international obligations with respect to abolition of the death penalty seriously, and that those obligations are not lower-order concerns to be overridden by the need for international cooperation in combatting crime.<sup>54</sup>

## Committee comment

- 3.58 The Committee believes Australia's domestic legislative position on the death penalty is unambiguous, and applauds the positions taken by successive Australian governments, which have relegated executions in Australia to the past.
- 3.59 It is the Committee's view that an ongoing dialogue is required to ensure Australians understand the importance of a universal and principled opposition to the death penalty.
- 3.60 The Committee notes that Australia's *Extradition Act 1988* and *Mutual Assistance in Criminal Matters Act 1987* contain safeguards for preventing the exposure of persons to the risk of the death penalty in foreign

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<sup>53</sup> Castan Centre, *Submission 9*, p. 4.

<sup>54</sup> Castan Centre, *Submission 9*, p. 7.

jurisdictions. Further, that the 2011 amendments to these Acts were in part intended to provide further protections against exposing people to the risk of execution.

- 3.61 Few witnesses expressed concerns about these laws, and the Committee notes statements by the Attorney General's Department that the laws as they stand are working to protect persons from exposure to the death penalty.<sup>55</sup>
- 3.62 However, the Committee notes concerns raised by the United Nations Office of the High Commissioner for Human Rights in relation to possible ambiguity in Australia's mutual assistance and extradition laws, and recommends that the Attorney General's Department review the legislative arrangements to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

## Recommendation

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### Recommendation 1

**The Committee recommends that the Attorney-General's Department conduct a review of the current legislative arrangements for extradition and mutual assistance to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.**

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55 Ms Hawkins, AGD, *Committee Hansard*, Canberra, 27 November 2015, p. 33.