



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

Submission

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

August 2024

Australian Lawyers for Human Rights

alhr.org.au | president@alhr.org.au

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ABOUT AUSTRALIAN LAWYERS FOR HUMAN RIGHTS (ALHR)

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practice and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

EXECUTIVE SUMMARY

ALHR is grateful for the opportunity to provide this submission to the Human Rights Subcommittee (the Subcommittee) of the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Australia's efforts to advocate for the worldwide abolition of the Death Penalty. The Inquiry has presented an opportunity to reiterate our strong opposition to the death penalty, as a matter of principle and international human rights law, in all circumstances.

The death penalty violates fundamental international human rights norms such as the right to life and the right not to be subjected to torture and other cruel, inhumane or degrading treatment or punishment. These rights are recognised in the *Universal Declaration of Human Rights*¹, the *International Covenant on Civil and Political Rights*² and other international and regional human rights instruments. The death penalty undermines human dignity. Furthermore, it has no value as a deterrent, and any miscarriage of justice, or wrongful conviction in capital cases is irreversible and irreparable.

ALHR recognises that every country has the right to approach domestic criminal justice issues in a sovereign manner, and a responsibility to protect the public from crime. However, the death penalty is not an evidence-based or effective way to do so and the taking of life is far too absolute a measure for the State to impose, even when backed by legal process. It is a counterintuitive proposition that a state would seek to deter violent crime by mirroring that

¹ UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948, <https://www.refworld.org/legal/resolution/unga/1948/en/11563>

² UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966,

violence in punishment by death. As such, Australia has an important international and regional leadership role to play in advocating for the abolition of the death penalty.

In 2015, the Joint Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into Australia's advocacy for abolition of the death penalty. ALHR made submissions³ in relation to this inquiry, setting out a range of recommendations. In 2016, a report was tabled in Parliament: *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*.⁴

The Australian Government acknowledged the recommendations of the Parliamentary Joint Committee in its March 2017 response and implemented some of them as part of a "whole of government strategy" published in June 2018.⁵

This submission considers the international and domestic frameworks that influence Australia's advocacy for abolition of the death penalty. The submission considers the international approach, and advocacy strategies in other jurisdictions. Further, the submission considers the Government's 2018 strategy, and makes recommendations for the Australian government to proactively and publicly fulfill the commitments set out therein.

ALHR makes the following recommendations:

1. The Australian Government should consult and advocate internationally.
2. Australia should demonstrate leadership within the Asia- Pacific region.
3. Annual reporting against the stated commitments in the 2018 Strategy to maintain accountability and transparency.
4. The Government should persistently prioritise the abolition of the death penalty in bilateral, regional and multilateral agreements.

³Australian Lawyers for Human Rights Submission on Australia's Advocacy for the Abolition of the Death Penalty, 1 October 2015 at:

<https://alhr.org.au/wp/wp-content/uploads/2017/03/Submission-from-Australian-Lawyers-for-Human-Rights.pdf>

⁴https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Death_Penalty/Report

⁵ <https://apo.org.au/sites/default/files/resource-files/2018-06/apo-nid178906.pdf>

5. The Australian Government should address gaps in domestic legislation and policy related to the death penalty.
6. The Australian Government should enter into bilateral agreements with other states to create standing agreements to only provide mutual assistance in circumstances where there is no risk of the death penalty.
7. The Australian Government should adopt all available measures to ensure the commutation of a death penalty sentence to a term of imprisonment, in certain circumstances.
8. The Australian Government to ensure that comprehensive consular assistance is provided to all Australian nationals or residents who are facing the death penalty, or have been sentenced to the death penalty, in a foreign jurisdiction. This should include financial assistance and independent legal representation.

BACKGROUND

According to Amnesty International's "Death Sentences and Executions 2023" Report, there were 1,153 recorded executions worldwide in 2023. This represents a 31% increase from 2022 and is the highest recorded number since 2015.⁶ This figure does not include the thousands of executions believed to have been carried out in countries for which there is no available transparent data, including China, which remains the world's lead executioner, as well as North Korea and Viet Nam, which are believed to resort to executions extensively.

Despite this increase in the total number of executions, the number of countries that carried out the death penalty reached the lowest on record in 2023. Presently, 112 countries are fully abolitionist and 144 in total have abolished the death penalty in law or practice.⁷ The Asia Pacific is the region with the highest rate of executions in the world.⁸

⁶ Amnesty International Global Report, *Death Sentences and Executions, 2023*
<https://www.amnesty.org/en/documents/act50/7952/2024/en/>

⁷ *ibid.*

⁸ *ibid.*

In addition to executions, 2023 saw 2,428 death sentences handed down globally in 2023, a 20% increase from 2022 figures.

In Australia, the death penalty was abolished at a Federal level in 1973, followed by New South Wales in 1985. Australia has progressively consolidated its stance against the death penalty through domestic law and policy, the ratification of treaties, and the creation of a national strategy.

INTERNATIONAL HUMAN RIGHTS FRAMEWORK

International human rights standards have developed in a way that favours ever tighter restrictions on the scope of the death penalty with a view to its total abolition. The importance of protecting individual life is internationally recognised in Article 3 of the Universal Declaration of Human Rights which provides that '*everyone has the right to life, liberty and security of person*'.⁹

Similarly, Article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR) holds that '*every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*'¹⁰.

Where countries are yet to abolish the death penalty, Article 6(2) of the ICCPR imposes strict guidelines on its use, stating that it '*may be imposed only for the most serious crimes*.' In a general comment on Article 6 of the ICCPR, the United Nations Human Rights Committee (the Committee) stated:

*"(Article 6) refers generally to abolition (of the death penalty) in terms which strongly suggest... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life."*¹¹

More recently, the Committee issued General Comment 36¹², recognising that Article 6 does not explicitly require retentionist states to abolish the death penalty, but commenting that:

⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>

¹⁰ *ibid.*

¹¹ General Comment 6 on Article 6 of the International Covenant on Civil and Political Rights adopted by the Committee at its 16th session on 27 July 1982

¹² UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life), CCPR/C/GC/35, 3 September 2019,

- The death penalty cannot be reconciled with full respect for the right to life;
- States which are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty in the foreseeable future;
- While the death penalty was not regarded by the ICCPR's drafters as a cruel, inhuman or degrading punishment, *per se*, subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead to the conclusion that the death penalty is contrary to Article 9 of the ICCPR in all circumstances.¹³

Second Optional Protocol to the International Covenant on Civil and Political Rights

Australia is a party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights*¹⁴ (ICCPR-OP2-DP) aiming at the abolition of the death penalty.

As at June 2024, 91 of the 173 UN Member States have ratified or acceded to this protocol.¹⁵ It provides for the total abolition of the death penalty but allows state parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. The preamble to the Protocol states that:

"..abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights."

By ratifying the ICCPR-OP2-DP Australia has committed itself to opposing the death penalty. ALHR submits that our interactions with countries who maintain the death penalty should steadfastly reflect that commitment.

The UN General Assembly has strongly appealed to all States who have not yet done so to become parties to the ICCPR and "*to consider as a matter of priority acceding to the Optional Protocols to the International Covenant on Civil and Political Rights*". In resolution 2005/59, adopted on 20 April 2005, the Commission called upon all States that still maintain the death penalty to "*abolish the death penalty completely and in the meantime establish a moratorium on*

¹³ HRC, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc CCPR/C/GC/36 (3 September 2019) (General Comment 36) paras. 50-51.

¹⁴ UN General Assembly, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, A/RES/44/128, 15 December 1989,

¹⁵ <https://worldcoalition.org/campagne/just-one-more-step-ratifying-international-and-regional-protocols/>

executions.” The resolution also calls for “States that no longer apply the death penalty but maintain it in their legislation to abolish it”.

UN General Assembly Resolutions

In a series of resolutions adopted in 2007, 2008, 2010, 2012, 2014, 2016 and 2018, the General Assembly urged States to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death.¹⁶

REVIEW OF AUSTRALIA’S CURRENT ADVOCACY FOR THE ABOLITION OF THE DEATH PENALTY

As a signatory to the ICCPR-OP2-DP Australia is recognised on the world stage as being opposed to the imposition of the death penalty.¹⁷

Australia’s international advocacy for the abolition of the death penalty has had a situational focus – that is, it tends to come to prominence when Australian nationals are exposed to the risk of a death sentence overseas.

As an abolitionist country in a region of retentionist States, Australia’s advocacy to end capital punishment is necessarily concentrated on regional and bilateral relations. This is reflected in diplomatic responses to the passing of death sentences on Australian citizens found guilty of capital offences in countries such as Indonesia and Singapore.

Australia’s abolitionist stance is also apparent at the bilateral level in its policy of refusing extradition requests in circumstances in which the person the subject of the request faces the real possibility of capital punishment if extradited for trial.¹⁸ Since December 2009, Australian government policy guidelines have required the Australian Federal Police to take into account a number of factors when considering requests to provide police-to-police assistance in matters in

¹⁶ <https://www.ohchr.org/en/topic/death-penalty/international-framework>

¹⁷ See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>

¹⁸ Extradition Act 1988, s 22(3)(c).

which accused persons may face the death penalty.¹⁹ That policy also requires that requests for assistance be granted Ministerial approval in any case in which a person has been charged with an offence which carries the death penalty.

In 2018, the Australian government expanded its commitment to death penalty abolition. Australia's *Strategy for Abolition of the Death Penalty* ('The Strategy'), published by the Department of Foreign Affairs and Trade, formalised its unequivocal stance for universal abolition, stating that it was committed to pursuing the universal abolition of the death penalty through '*all the avenues available*'. Further, it stated that Australia would be a leader in efforts to end the use of the death penalty worldwide. The Strategy focuses on the following:

- (a) bilateral and multilateral advocacy;
- (b) engagement with civil society organisations;
- (c) support for research in the field;
- (d) the need to strengthen the safeguards in place to prevent exposing people to the death penalty;
- (e) the role that various government agencies can play as part of this advocacy.²⁰

In January 2018, Australia took up its seat on the United Nations Human Rights Council, for a three year term. The global abolition of the death penalty was central to Australia's campaign for council membership.

¹⁹ Australian Government, Attorney-General's Department, Australia's Universal Periodic Review 2010, <http://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-RightsReporting/Documents/UniversalPeriodicReview.PDF>

²⁰ Department of Foreign Affairs and Trade (Australia) 2018, *Australia's strategy for abolition of the death penalty*, Government of Australia, <https://apo.org.au/sites/default/files/resource-files/2018-06/apo-nid178906.pdf>

DOMESTIC LEGISLATION RELEVANT TO THE DEATH PENALTY

The website of the Attorney General's Department sets out the following domestic legislation relevant to the death penalty²¹:

1. The *Death Penalty Abolition Act 1973* provides that the death penalty may not be imposed for any offence against a law of the Commonwealth, a state or a territory.
2. Division 268 of the *Criminal Code Act 1995* provides that murder and unlawful killings are offences when they constitute genocide, crimes against humanity or war crimes.
3. In the extradition context, section 22(3)(c) of the *Extradition Act 1988* provides that a person whose extradition is sought for an offence that is punishable by death may only be surrendered if Australia has received an undertaking from the requesting country that the person will not be tried for the offence; or if the person is tried for the offence, the death penalty will not be imposed on the person; or if the death penalty is imposed on the person, it will not be carried out.
4. Under the *Mutual Assistance in Criminal Matters Act 1987*, a request by a foreign country for assistance must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence 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. In addition, a request by a foreign country for assistance under the Act may be refused if the Attorney-General believes that the provision of the assistance may result in the death penalty being imposed on a person. 'Special circumstances' is not defined in the Act but as detailed in the Explanatory Memorandum to the *Mutual Assistance in Criminal Matters Legislation Amendment Act 1996*, examples of special circumstances may include where the evidence would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty. Prior to being charged with, or convicted of a death penalty offence, the Attorney-General has a discretion to refuse to provide assistance where it is believed that the provision of the assistance may result in the death penalty being imposed on a person: and, after taking

²¹<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-life#:~:text=The%20right%20to%20life%20includes,unlawful%20killin gs%20and%20punish%20offenders.>

into consideration the interests of international criminal cooperation, is of the opinion that in the circumstances of the case, the request should not be granted.

5. The Australian Federal Police's *Practical Guide on international police-to-police assistance in potential death penalty situations* requires Ministerial approval of assistance in any case in which a person has been arrested, detained, charged with, or convicted of, an offence that carries the death penalty. Where a person is yet to be arrested, detained, charged or convicted of a death penalty offence, the Guide requires senior AFP management to consider a set of prescribed factors before providing police assistance to foreign countries. Examples of these factors include the age and personal circumstances of the person and the seriousness of the suspected criminal activity.

INTERNATIONAL ADVOCACY STRATEGIES

ALHR's 2015 submission strongly encouraged Australia to use its unique position in the Asia Pacific to take on a leadership role in regional efforts to abolish the death penalty and achieve a moratorium on death sentences. We reiterate this call, and submit once again that Australia must be consistent and unambiguous in conveying that abolition is a prioritised task for the Government.

ALHR's 2015 submission urged the government to follow the lead of countries like the United Kingdom and Sweden, whose strategies proposed to actively persuade states that still include the death penalty as part of their legislation to change their attitude.

United Kingdom

The United Kingdom (UK) Government's strategy for the abolition of the death penalty includes clear benchmarks and goals to guide British embassies in advocating against the death penalty in countries in which executions continue. It defines three goals to support an overarching objective of global abolition:

1. Increase the number of abolitionist countries, or countries with a moratorium on the use of the death penalty;
2. In countries that still apply the death penalty, secure further restrictions on its use and reductions in the number of executions;

3. When the death penalty is applied, ensure that universal minimum standards on its use are met. These include fair trial rights and the non-execution of juveniles.²²

In the intervening years, the UK Government has not published any updates to this strategy, but has maintained the global abolition of the death penalty as a priority. It has placed a particular focus on advocating for abolition in Asia and the Commonwealth Caribbean. This strategy enables UK Government consulates in those regions to actively follow developments and offer expert assistance to states and territories where possible.

Importantly, the UK Government's strategy also earmarked Foreign Commonwealth Office (UK FCO) funding to aid death penalty research, local lawyers in bringing challenges against the death penalty, and civil society groups in their advocacy efforts. In the Caribbean region, UK FOC funded project work helped to establish legal safeguards which effectively reduced the use of the death penalty. Funding was also allocated to assist in the creation of regional not-for-profit organisations such as Greater Caribbean For Life, to direct and support Caribbean activists with training and material, and to mobilise further support for abolition of the death penalty.²³

In addition to the above measures, the UK FCO also supports the work of an All-Party Parliamentary Group (APPG) for the Abolition of the Death Penalty which works "*energetically with parliamentarians worldwide to bring about abolition.*" The APPG's advocacy continues in 2024.²⁴

Sweden

The Swedish Government has also been a world leader in working actively at an international level for the total abolition of the death penalty. In Sweden's publicly stated view, "*the death penalty is an inhuman, cruel and irreversible punishment that has no place in a modern legal system, and its abolition is a prioritised task for the Government in efforts to promote and increase respect for human rights.*"²⁵ Sweden works actively to persuade states that still include the death penalty as part of their legislation to change their attitude. This work is conducted

²² Chapter 5, United Kingdom Government Foreign and Commonwealth Office, Human Rights and Democracy Report 2014 12 March 2015 available at: <https://www.gov.uk/government/publications/human-rights-anddemocracy-report-2014/human-rights-and-democracy-report-2014>

²³ *Ibid*, Chapter 3.

²⁴ <http://www.appgdeathpenaltyabolition.uk/all-party-parliamentary-group-abolition-death-penalty.html>

²⁵ See

<http://www.manskligarattigheter.se/en/human-rights/what-rights-are-there/right-to-life-the-death-penalty>

primarily in the UN, but also in the Council of Europe, within the Organisation for Security and Cooperation in Europe (OSCE) and in bilateral contacts.²⁶

Norway

Abolition of the death penalty has been one of the priority areas of Norway's human right's policy. The Norwegian Government has declared that Norway would encourage more countries to abolish the death penalty, and that abolition is '*a priority issue that should be raised wherever appropriate*' at political-level meetings and during official visits, in political dialogues, human rights dialogues, and in consultations on human rights with other countries.²⁷

FURTHER STEPS FOR AUSTRALIA'S ADVOCACY

ALHR acknowledges the Australian government's 2018 strategy and declaration of its commitment to advocate for abolition, but urges Australia to continue to work hard at a regional and an international level to be a public and proactive leader in the pursuit of global abolition of the death penalty. ALHR echoes the recommendations set out in the Law Council's 'Policy Statement on the Death Penalty'.²⁸

ALHR repeats the following relevant recommendations from our 2015 submissions:

- 1. Consult and Advocate Internationally: consult widely with other leaders in this area of advocacy such as the United Kingdom and join forces with other nations - through the United Nations and other multilateral and regional bodies - to push for universal adoption of a global moratorium on the death penalty;**
- 2. Lead within the Asia-Pacific region: engage with advocacy groups in countries retaining the death penalty, particularly those from ASEAN and Pacific Island**

²⁶ The Hon. John von Doussa QC, President, Human Rights and Equal Opportunity Commission (HREOC), The Death Penalty - a matter of principle, 22 October 2006, Speech given to United Nations Association of Australia, Adelaide - available at: <https://www.humanrights.gov.au/news/speeches/death-penalty-matterprinciple> accessed 18 September 2015

²⁷ Sato, M. 2022. Politics of International Advocacy Against the Death Penalty: Governments as Anti-Death Penalty Crusaders. *International Journal for Crime, Justice and Social Democracy*, [online] 11(3), pp. 1-43. Available at: <https://doi.org/10.5204/ijcjsd.v11i3.1889> [Accessed 23 July 2024].

²⁸ Law Council of Australia, 'Law Council Policy Statement on the Death Penalty', October 2021; <https://lawcouncil.au/docs/c07d9246-cd39-e711-93fb-005056be13b5/0709-Policy-Statement-Death-Penalty.pdf>

countries and use our aid programme to support civil society organisations campaigning for abolition in retentionist countries;

Further, ALHR makes the following additional recommendations, in light of developments since 2015:

- 1. ALHR supports annual reporting against the stated commitments in the 2018 Strategy to maintain accountability and transparency.**
- 2. ALHR urges the Government to persistently prioritise the abolition of the death penalty in bilateral, regional and multilateral agreements. Particularly, ALHR encourages the Australian Government to use its position in the Asia Pacific region to urge other states to ratify the Second Optional Protocol to the ICCPR.**
- 3. ALHR recommends that the Australian Government address gaps in domestic legislation and policy related to the death penalty. Specifically, the discretions set out in the mutual assistance legislation and policy are not consistent with an unequivocal stance on the death penalty, and still leave a risk of exposing individuals to the death penalty in other states. ALHR recommends that such discretions should be reviewed and removed from domestic legislation and policy.**
- 4. ALHR recommends that the Australian Government enter into bilateral agreements with other states to create standing agreements that Australia will only provide mutual assistance in circumstances where the person will not be exposed to any risk of the imposition of the death penalty, whether or not it would be carried out.**
- 5. ALHR recommends that the Australian Government adopt all available measures to ensure the commutation of a death penalty sentence to a term of imprisonment, in the following circumstances:**
 - Where an Australian national or resident faces the death penalty, or has been sentenced to the death penalty, in a foreign jurisdiction;**

- **Where a non-Australian national or resident faces the death penalty, or has been sentenced to the death penalty, in a case that has particular relevance to Australia. For example, where the victim of the crime was Australian.**
- 6. ALHR urges the Australian Government to ensure that comprehensive consular assistance is provided to all Australian nationals or residents who are facing the death penalty, or have been sentenced to the death penalty, in a foreign jurisdiction. This should include financial assistance and independent legal representation.**

If you would like to discuss any aspect of this submission, please contact Kerry Weste, President Australian Lawyers for Human Rights, by email at president@alhr.org.au

Yours faithfully,

A handwritten signature in blue ink, appearing to be 'Kerry Weste', written in a cursive style.

Kerry Weste