

# BRIEFING PAPER

# DEATH PENALTY

THE **ESSENTIAL** MEMBERSHIP FOR  
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

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April 2019

## DEATH PENALTY

### Issue

Contrary to the right to life and the right not to be subjected to cruel, inhuman or degrading punishment (as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights) the death penalty still exists in many countries around the world.

### Background

On 19 December 2007, Australia sponsored and voted in favour of a landmark United Nations General Assembly resolution which called for an immediate moratorium on executions as a first step towards the universal abolition of the death penalty.

On 11 March 2010, with bipartisan support, the Commonwealth Parliament passed the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act*. This Act amends the *Death Penalty Abolition Act 1973* (Cth) to extend the Commonwealth prohibition on the death penalty to all States and Territories. This forecloses the possibility of any individual State jurisdiction reintroducing the death penalty.

However, the death penalty is still legal in many countries around the world, particularly in Asia.

The issue again came to the fore in April 2015 when Indonesia executed two Australian citizens, Andrew Chan and Myuran Sukumaran, on drug related offences.

### Policy Position

#### Law Council of Australia

The Law Council's opposition to the imposition or execution of the death penalty is absolute.

It is the position of the Law Council that no person should be subjected to the death penalty irrespective of their nationality, the nature of the crime they are alleged to have committed or the time and place of its alleged commission.

The Law Council opposes the imposition of the death penalty irrespective of the method of execution.

The death penalty is in violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Consistent with the view that the death penalty represents a grave human rights violation, the Law Council believes that it is a matter which transcends considerations of State sovereignty.

On 10 June 2016, the Law Council launched its 2016 Federal Election Policy Platform, which outline its priorities for a newly-elected Federal Government. The platform sets out the key areas for improvement of the law and legal policy, which will benefit the Australian community and promote the national interest. One of the key areas is the abolition of the death penalty. The Law Council calls on all parties to:

- Support and implement the recommendations arising from the Joint Standing Committee on Foreign Affairs, Defence and Trade's Report into Australia's Advocacy for the Abolition of the Death Penalty.
- Promptly conduct a review of 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.
- Strengthen Australia's domestic legal framework and arrangements to ensure Australia does not expose a person elsewhere to the real risk of execution.
- Develop a strategy for the abolition of the death penalty, which outlines the methods to be employed to proactively advance the objective of global abolition.

## Submission

On 9 October 2015 the Law Council and Australian Bar association made a joint submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's report into Australia's advocacy for the abolition of the death penalty. The submission makes two key recommendations for further steps Australia could take to advocate for an end to the death penalty, including that:

- Australia should develop a Strategy for abolition of the death penalty, which outlines the methods it will employ to proactively advance the objective of global abolition; and
- Australia should strengthen its domestic legal framework and arrangements to ensure Australia does not expose a person elsewhere to the real risk of execution.

In a [media release](#) issued on 5 May 2016, Law Council commended Parliament on adopting its recommendation to develop, fund and implement a whole-of-government Strategy for the Abolition of the Death Penalty – with a particular focus on countries in the Indo-Pacific and United States of America.

In June 2018, the Department of Foreign Affairs and Trade published Australia's Strategy for Abolition of the Death Penalty, which states the Australia's policy goals and the government's bilateral advocacy and multilateral advocacy positions.

## Law Society of Western Australia

It has been a longstanding position of the Law Society of Western Australia, the Australian legal profession and our nation to oppose the death penalty.

In a media release issued on 20 February 2015, the then Law Society President, Matthew Keogh stated that, *"While crime must always be appropriately punished, all life is precious and the legal profession opposes all forms of the death penalty across the globe as a breach of the fundamental right to life."*

The Society believes it is incumbent on the profession to stand tall in calling on other nations to

treat their offenders humanely, as we seek to do in Australia.

## Funding implications

N/A

## Policy implications

The Law Council's opposition to the death penalty has the following policy and advocacy implications:

- In accordance with its obligations under the Second Optional Protocol to the ICCPR, Australia proactively commits itself to the abolition of the death penalty not only in Australia, but across the world, including by persistently identifying the abolition of the death penalty as a matter of importance in bi-lateral and multi-lateral talks between sovereign States and by encouraging other States to ratify the Second Optional Protocol.
- Australia is open, consistent and unequivocal in its condemnation of the death penalty whenever and wherever it is carried out.
- Australia maintains its prohibition on extraditing or transferring any person to a foreign jurisdiction in circumstances where that person may face the death penalty, unless an explicit official undertaking is provided to the Australia Government that the death penalty will not be imposed and/or carried out on the person who is the subject of the request.
- Australia clarifies, strengthens and extends its prohibition on providing mutual assistance to foreign jurisdictions in criminal matters where such assistance may lead to the arrest, prosecution or conviction of a person for an offence carrying the death penalty. This would include ensuring that Australian law enforcement agencies, including State agencies, only cooperate with foreign law enforcement agencies to the extent that such cooperation is consistent with Australia's obligation not to expose a person to the real risk of execution.

- Australia adopts all available measures to ensure that Australian residents facing the death penalty or sentenced to death in a foreign jurisdiction have their death sentences commuted to a term of imprisonment.
- Australia adopts all available measures to ensure the commutation of a non-Australian resident's death sentence in circumstances where the advocacy of the Australian Government may have particular resonance, for example, where the victims or targets of the relevant crime are Australian or where Australia was the intended destination for trafficked drugs.
- Australian residents facing the death penalty or sentenced to death in foreign jurisdictions have access to consular assistance, independent legal representation and the financial assistance necessary to facilitate the preparation of a comprehensive defence, appeal and/or clemency plea.
- The Australian Constitution is amended to include a prohibition on the death penalty, or at the very least Commonwealth legislation is enacted to adopt the Second Optional Protocol to the ICCPR into domestic law thereby foreclosing the possibility of a hasty re-introduction of the death penalty in any Australian jurisdiction.

## Recommendation

The Law Society of Western Australia seeks the support of all parties to:

- Support and implement the recommendations arising from the Joint Standing Committee on Foreign Affairs, Defence and Trade's Report into Australia's Advocacy for the Abolition of the Death Penalty;
- Promptly conduct a review of 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;
- Strengthen Australia's domestic legal framework and arrangements to ensure Australia does not expose a person elsewhere to the real risk of execution; and
- Implement strategies to achieve the policy goals outlined in Australia's Strategy for the Abolition of the Death Penalty, published by the Department of Foreign Affairs and Trade.



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