

Law Council of Australia

Law Council Policy Statement on the Death Penalty

Policy Statement

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Law Council
OF AUSTRALIA

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Executive Summary

The Law Council of Australia:

- Opposes the imposition or execution of the death penalty in all circumstances for all people.
- Opposes all forms of torture or cruel, inhuman or degrading treatment or punishment.

The purpose of this policy statement is to explain in further detail:

- the nature of the Law Council's opposition to the death penalty;
- the basis for the Law Council's opposition to the death penalty;
- other grounds for opposing the death penalty; and
- the policy and advocacy implications of the Law Council's opposition to the death penalty.

The Law Council also opposes all forms of extrajudicial, summary or arbitrary killings.

The Nature of the Law Council's Opposition to the Death Penalty

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, personal characteristics, the nature of the crime they are alleged to have committed, the time, place or circumstances of its alleged commission or the nature or identity of any victim(s) of the crime alleged.

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

The Law Council is committed to the international abolition of the death penalty and, in the interim, to an international moratorium on executions and the commutation of existing death sentences.

The Basis for the Law Council's Opposition to the Death Penalty

On 10 October 2017, the Secretary-General of the United Nations (UN) remarked, in his first public statement on the death penalty 'the death penalty has no place in the 21st century'.¹

On 23 February 2021, the UN High Commissioner for Human Rights commented *inter alia* 'the death penalty undermines human dignity and denies our most basic right, the right to life'.²

¹ United Nations Secretary-General, 'Transparency and the death penalty' (Speech, 10 October 2017).

² United Nations High Commissioner for Human Rights, 'Human rights violations related to the use of the death penalty, in particular with respect to whether the use of the death penalty has a deterrent effect on crime rate', 46th session of the Human Rights Council (Biennial high-level panel discussion on the question of the death penalty, Geneva, 23 February 2021).

The right not to be arbitrarily deprived of one's life is guaranteed by customary international law binding on all countries, as well as by treaties (such as Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**)³ and the Second Optional Protocol to the ICCPR⁴) which bind those States party to them. 'Article 6 of the ICCPR sets out specific safeguards so that it is only applied for the 'most serious crimes' - which must be read restrictively and relate only to crimes of extreme gravity involving intentional killing. There are also safeguards limiting the application of the death penalty and protecting the rights of those facing the death penalty applicable in countries where the ICCPR has not yet been ratified. Similar restrictions are found in the *Safeguards guaranteeing protection of the rights of those facing the death penalty* adopted by the UN Economic and Social Council (**ECOSOC**) in 1984.⁵

The Law Council is opposed to the death penalty on the basis that it is fundamentally incompatible with the realisation or fulfilment of the right to life (enshrined in Article 3 of the Universal Declaration of Human Rights (**UDHR**), Article 6 of the ICCPR and in customary international law), and the right not to be subjected to cruel, inhuman or degrading treatment or punishment (enshrined in Article 5 of the UDHR, Article 7 of the ICCPR, Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶ and in customary international law).

The Law Council does not accept that whether and in what circumstances the death penalty may lawfully be imposed is a matter that each State is free to determine by itself, without reference to international laws and standards.

The Law Council believes that, because all States are bound by customary international law on the subject and some States are bound by specific treaty obligations, the imposition and execution of the death penalty by any State is a legitimate subject of scrutiny and comment by individuals and agencies within and outside the State and indeed by other States.

In support of its position, the Law Council notes that:

- The UN Human Rights Committee (**HRC**), which is responsible for the interpretation of the ICCPR, has issued General Comment 36 recognising that Article 6 does not explicitly require States, which have yet to do so, to abolish the death penalty, but commenting that:
 - 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; and
 - 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 7 of the ICCPR in all circumstances.⁷

³ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, GA Res 44/128 (15 December 1989).

⁵ ECOSOC, *Safeguards guaranteeing protection of the rights of those facing the death penalty*, ESC Res 1984/50 (25 May 1984). The Safeguards are set out in the Appendix to Australia's Strategy for Abolition of the Death Penalty.

⁶ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁷ 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.

- The UN General Assembly has adopted a Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, which has 89 States parties, including Australia.⁸
- Several national courts in other jurisdictions have found that the death penalty is inconsistent with a constitutional guarantee of the right to life and/or the right not to be subjected to cruel, inhuman or degrading treatment or punishment.

In addition, the Law Council notes that Article 6 of the ICCPR places strict limitations on the use of the death penalty in retentionist countries. These include that:

- it may only be imposed for the ‘most serious crimes’, that is ‘crimes of extreme gravity involving intentional killing’;⁹
- it may not be imposed as a punishment for an offence retroactively;
- it may only be imposed following a fair trial before an independent, impartial and competent tribunal;
- it may only be carried out after appeal rights have been exhausted and the judgement has become final;
- it cannot be imposed on persons below eighteen years of age or carried out on a pregnant woman;
- the person on whom it is imposed must have the opportunity to seek pardon or commutation of the sentence; and
- it may not be imposed in a manner that is discriminatory.¹⁰

As noted, similar restrictions exist in the *Safeguards guaranteeing protection of the rights of those facing the death penalty* adopted by ECOSOC.¹¹

The ICCPR makes it clear that even compliance with these restrictions cannot be used to legitimise retention of the death penalty. In fact, the ICCPR specifically states that nothing in Article 6 ‘shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the ICCPR’.

Beyond the restrictions set out in Article 6, the HRC has commented that the death penalty must not be imposed on people with serious psychosocial or intellectual disabilities which impede their effective defence. State parties should also refrain from executing persons with limited moral culpability, older persons, parents of very young or dependent children, and individuals who have suffered serious human rights violations.¹²

It has also stated that:

- the mandatory imposition of the death penalty for certain crimes is in breach of the ICCPR because it represents an arbitrary deprivation of life;¹³ and

⁸ As at 19 July 2021. See UN Treaty Collection, ‘Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en>.

⁹ General Comment 36, para 35.

¹⁰ General comment 36, para 44.

¹¹ ECOSOC, *Safeguards guaranteeing protection of the rights of those facing the death penalty*, ESC Res 1984/50 (25 May 1984).

¹² General Comment 36, para 49.

¹³ ‘Under no circumstances can the death penalty ever be applied against conduct the very criminalisation of which violates the Covenant, including adultery, homosexuality, apostasy, establishing political opposition groups or offending a head of State’: General Comment 36, para 36.

- the imposition of the death penalty following a trial conducted in violation of fair trial standards renders the sentence arbitrary and in violation of the right to life.¹⁴

The HRC has also noted that States parties to the ICCPR that have abolished the death penalty or that have ratified the Second Optional Protocol 'are barred from reintroducing it'.¹⁵ The HRC has stated that States parties may not expand the category of capital offences to include those that were not so subject when they became parties to the ICCPR or at a later time.¹⁶

Other Grounds for Opposing the Death Penalty

While the Law Council's opposition to the death penalty is founded on a belief in the inherent dignity and inalienable rights of all human beings, it is also the Law Council's position that:

- there is no persuasive evidence that the death penalty deters crime more effectively than other forms of punishment;¹⁷
- State-sanctioned retributive violence may contribute to the legitimisation, normalisation and perpetuation of a broader societal culture of violence;
- the death penalty is unfair and discriminatory in that studies show that it is disproportionately imposed on the most vulnerable members of society including people with disability, people with lower levels of education, the poor, persons belonging to religious, ethnic or sexual minorities, persons exercising their human rights and women;¹⁸
- the imposition of the death penalty can also have a particularly unfair and discriminatory impact upon victims of modern slavery and human trafficking who have been, by definition, victims of serious human rights violations. Such persons need particular protection from the death penalty either because any participation they may have in criminal wrongdoing is likely to be the result of coercion, or because they are particularly vulnerable to exploitation and mistreatment so as to be forced into taking action either: to protect themselves from physical and mental harm; to escape from their circumstances; or, otherwise, to seek to protect their personal safety and integrity;
- no criminal justice system is safe from error and the death penalty is irrevocable, miscarriages of justice cannot be rectified and the risk of executing the innocent remains;
- the death penalty denies to the convicted person any possibility of rehabilitation and disregards rehabilitation that may occur between the imposition and execution of the death penalty;
- the practice of the death penalty, necessarily, constitutes torture and cruel, inhuman or degrading treatment in that it is impossible to avoid torture, cruel,

¹⁴ General Comment 36, para 41.

¹⁵ Ibid, para 34.

¹⁶ Ibid.

¹⁷ See UN High Commissioner for Human Rights, 'Human rights violations related to the use of the death penalty, in particular with respect to whether the use of the death penalty has a deterrent effect on crime rate', 46th session of the Human Rights Council (Biennial high-level panel discussion on the question of the death penalty, Geneva, 23 February 2021). See also UN Human Rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc. A/HRC/42/28 (28 August 2019) para 47.

¹⁸ United Nations General Assembly, Moratorium on the use of the death penalty, Report of the Secretary-General, UN Doc. A/75/309 (13 August 2020) paras 37-55.

inhuman and degrading treatment in the methods of execution and the living conditions of people on death row; and

- the death penalty has the capacity to undermine the freedom of conscience and dignity and mental well-being of those involved in the imposition and administration of the death penalty, thereby, harming them by requiring them to participate in State sanctioned killings.

Policy and Advocacy Implications of the Law Council's Opposition to the Death Penalty

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

Advocacy to the Australian Government

Australia's Strategy for Abolition of the Death Penalty¹⁹ (**Strategy**) describes the Australian Government's aspirations for policy and advocacy at the national and international level that are supported by the Law Council. The Strategy also should be supported and implemented by all federal portfolios with regular reporting against the stated commitments.

The Law Council notes that the many avenues through which Australia's advocacy may be conducted include bilateral, multilateral (including United Nations and Commonwealth) and regional initiatives.

The Law Council is committed to advocacy to the Australian Government to ensure that:

- Australia proactively maintains its commitment to the abolition of the death penalty not only in Australia, but across the world. This includes by persistently identifying the abolition of the death penalty as a matter of importance in bilateral, regional and multilateral talks, treaties and other political agreements among sovereign States, by continuing to raise issues relating to the death penalty in the Human Rights Council Universal Periodic Review procedure, by encouraging other States to ratify the Second Optional Protocol to the ICCPR, by supporting the activities of anti-death penalty non-government organisations working in priority countries and jurisdictions and by continuing collaboration with the organisations described in the Strategy.
- Australia is open, consistent and unequivocal in its condemnation of the death penalty whenever and wherever it is imposed or carried out.
- Australia seeks to address existing and emerging gaps in the operation of domestic legislation and policy that may expose persons to the death penalty overseas. This includes matters governed by the *Extradition Act 1988* (Cth); the *Mutual Assistance in Criminal Matters Act 1987* (Cth); the Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations; and Australia's support for Australians at risk of facing the death penalty overseas (governed by the DFAT Consular Policy Handbook). The Strategy should explicitly address such matters.
- 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 and non-revocable undertaking is provided

¹⁹ Department of Foreign Affairs and Trade 'Australia's Strategy for Abolition of the Death Penalty' (June 2018).

to the Australian 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 and Territory 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.
- To assist in the achievement of this latter objective, Australia seeks to enter bilateral agreements with other countries creating standing arrangements with Australia to the effect that, where Australia provides mutual assistance, the person of interest cannot be sentenced to death.
- Australia limits, by legislation, official discretion that may be used to assist cooperation with foreign agencies where such exposure may occur.
- Australia adopts all available measures to ensure that Australian nationals or residents facing the death penalty or sentenced to the death penalty 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 or the object of an intended crime.
- Australian nationals or residents facing the death penalty or sentenced to death in foreign jurisdictions have access to consular assistance, independent interpreters, independent legal representation and the financial assistance necessary to facilitate the preparation of a comprehensive defence, appeal and/or clemency plea. In particular, consular arrangements need to be sufficiently adroit to ensure that high quality legal representation and interpreter support are arranged at the investigation and trial stages of prosecutions when an individual's rights are most at risk and most capable of being protected by competent representation.
- Australia considers the submission of *amicus curiae* briefs in the hearings in foreign jurisdictions of cases of Australian nationals or residents facing the death penalty.
- Australia does not become party to international agreements which might expose Australian nationals or residents to the death penalty.
- Australia makes transparent disclosures by way of annual reporting of data that is relevant to implementation of the Strategy. This includes the:
 - extent to which consulates are trained on death penalty issues;
 - number of instances where consular access is denied to Australian nationals facing the death penalty, broken down by jurisdiction; and
 - number of cases of Australian nationals or residents facing the death penalty with documented mental health issues.

The Law Council recognises that the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) was a valuable step towards ensuring the continued abolition of the death penalty in Australia. The Law Council will continue to advocate for ultimate entrenchment of domestic abolition in the Australian Constitution.

Advocacy Generally

The Law Council is committed to contributing to public debate on the death penalty within Australia with a view to ensuring that the community is informed about the matters described above and about:

- the ineffectiveness of the death penalty and its devastating impact on the individuals involved and their families, as well as others involved in the process including lawyers, law enforcement officers and correctional staff;
- relevant developments in international human rights law and Australia's obligations in that regard;
- the current legislative provisions and policies which govern the interaction of the Australian Government and Australian agencies with law enforcement authorities in jurisdictions which retain the death penalty, the practical implications of those policies and existing and emerging gaps that may expose persons to the death penalty overseas; and
- the approaches adopted by other abolitionist countries with respect to their commitments to work towards the worldwide abolition of the death penalty, as well as the advocacy and approaches of national, regional and international legal organisations.

The Law Council is committed to advocating for international legal organisations of which it is a member to adopt a position opposing the death penalty and to commit to its abolition.

In bilateral meetings with peak bodies representing the legal profession in foreign jurisdictions, particularly jurisdictions which retain the death penalty, the Law Council will strategically identify opportunities to provide information about its opposition to the death penalty, the basis for that opposition and its related advocacy work.

When appropriate opportunities present themselves and to the extent that resources allow, the Law Council will work with key counterpart peak bodies seeking to advance the case for abolition in their jurisdictions, a moratorium on executions, the commutation of outstanding death sentences and the ratification of the Second Optional Protocol to the ICCPR. The Law Council will draw attention to, and seek to address, circumstances which come to its attention where lawyers or civil society groups in retentionist countries suffer sanctions, discrimination or disadvantage because of their work against the death penalty or in representing defendants in death penalty cases.

To the extent that resources allow, the Law Council is also committed to providing assistance and support to Australian legal practitioners who provide *pro bono* and legal assistance to Australian citizens and residents facing the death penalty abroad, and to working with its counterpart bodies to protect and support lawyers in retentionist countries who take on capital defence cases. It will also continue to consider its own role in light of specific circumstances which arise from time to time.