



Law Council
OF AUSTRALIA

POLICY STATEMENT

The Death Penalty

September 2007



Law Council Policy on the Death Penalty

The Law Council of Australia's longstanding policy on the Death Penalty states:

The Law Council of Australia

- ◇ Opposes the imposition or execution of the death penalty.
- ◇ 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; and
- ◇ the policy and advocacy implications of the Law Council's position.

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, 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 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 of Law Council Opposition to the Death Penalty

The Death Penalty is a Human Rights Violation

The Law Council is opposed to the death penalty on the basis that it is a breach of the most fundamental human right: the right to life.

This right is enshrined in Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

The Law Council is further opposed to the death penalty on the basis that it is a breach of the right not to be subjected to cruel, inhuman or degrading punishment.

This right is enshrined in Article 5 of the Universal Declaration of Human Rights, Article 7 of the ICCPR and Article 16 of the Convention Against Torture.

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. That is, the Law Council does not accept that whether and in what circumstances the death penalty may be imposed is a matter to be resolved exclusively by States themselves, without reference to international laws and standards. The Law Council believes that the imposition and execution of the death penalty by a State is a legitimate subject of comment and scrutiny by individuals outside the State or indeed by other States.

In making this statement, the Law Council acknowledges that Article 6 of the ICCPR does not explicitly require States, which have yet to do so, to abolish the death penalty.

However, in support of its position the Law Council notes that:

- ◇ The UN Human Rights Committee, which is responsible for the interpretation of the ICCPR, has issued a pronouncement stating that the abolition of the death penalty represents progress towards the fuller enjoyment of the right to life and has accordingly encouraged States to abolish the death penalty in law.
- ◇ The UN General Assembly had adopted a Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, which has been signed or ratified by at least 68 countries, including Australia.
- ◇ 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 also notes that Article 6 of the ICCPR places strict restrictions on the use of



the death penalty in non-abolitionist countries. These include that:

- ◇ it may only be imposed for the most serious crimes;
- ◇ 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 a child or carried out on a pregnant woman; and
- ◇ the person on whom it is imposed must have the opportunity to seek clemency or pardon.

The ICCPR makes it clear that compliance with these restrictions can not be used to legitimise retention of the death penalty. In fact, the ICCPR specifically states that nothing in Article 6 “should 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 UN Human Rights Committee 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.

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 would-be offenders more effectively than other forms of punishment;
- ◇ State-sanctioned retributive violence contributes to the legitimisation, normalisation and perpetuation of a broader societal culture of violence;
- ◇ the death penalty is discriminatory in that studies show that it is disproportionately imposed on the poorest, least educated, most vulnerable members of society; and
- ◇ no criminal justice system is perfect and therefore the risk of executing the innocent can never be eliminated.

Policy Implications of the Law Council’s Opposition to the Death Penalty

In policy terms, the Law Council’s opposition to the death penalty has the following policy and advocacy implications.

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

- ◇ 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, include 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 the 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.

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 ineffectiveness of the death penalty and its devastating impact;
- ◇ 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 and the practical implications of those policies; and

- ◇ the approaches adopted by other abolitionist countries with respect to their commitments to work towards the worldwide abolition of the death penalty.

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 committing to its abolition.

In bi-lateral meetings with peak bodies representing the legal profession in foreign jurisdictions, particularly jurisdictions which retain the death penalty, the Law Council is committed to providing 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 is committed to lobbying foreign governments to abolish the death penalty, to commute all outstanding death sentences and to ratify the Second Optional Protocol to the ICCPR.

The Law Council is committed to providing assistance and support to Australian legal practitioners who provide pro bono and legal assistance to Australian residents facing the death penalty abroad.

Authorised by LCA Directors

Law Council of Australia

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