

Background Paper

Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty

(annexing a draft Death Penalty Abolition Amendment Bill 2008)



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Author: Michael Walton

About the NSW Council for Civil Liberties

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

About this publication

With the exception of section 4.4, this paper was written by Michael Walton. Section 4.4 was written by a member of the NSW Council for Civil Liberties who has asked not to be named.

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Abbreviations

BP	Background Paper
CCL	New South Wales Council for Civil Liberties
Cth	Commonwealth of Australia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Imp	Imperial
NSW	New South Wales
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations
UNHCHR	UN High Commissioner for Human Rights

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1. Executive Summary

1. The year 2008 marks the 60th anniversary of the *Universal Declaration of Human Rights*. In the spirit of the Universal Declaration, this paper argues that the federal Parliament of Australia should pass legislation adopting into Australian law the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* ('the Protocol').
2. The Second Optional Protocol is one of five international human rights treaties that make up the *International Bill of Human Rights*.¹

International Bill of Human Rights

- [*Universal Declaration of Human Rights \(1948\)*](#)
- [*International Covenant on Economic, Social and Cultural Rights \(1966\)*](#)
- [*International Covenant on Civil and Political Rights \(1966\)*](#)
- [*Optional Protocol to the International Covenant on Civil and Political Rights \(1966\)*](#)
- [*Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty \(1990\)*](#)

3. The Second Optional Protocol creates an absolute (or 'non-derogable') individual human right not to be executed and prohibits the execution of anyone under the law of a ratifying country.² The Protocol also carries two important implications: it prohibits the reintroduction of the death penalty;³ and it obliges a country in all circumstances to ensure it exposes no one to the real risk of execution.⁴
4. Australia acceded to the Second Optional Protocol on 2 October 1990.⁵ The Protocol entered into force in international law on 11 July 1991. It has currently been ratified by 64 nations, and signed by a further 8 countries.⁶
5. The Second Optional Protocol has not been adopted into domestic law and therefore is not legally binding in Australian courts. This means that a populist State government could reintroduce the death penalty. In 1990, when the Protocol was ratified, the adoption of the Protocol into domestic law was not considered necessary because all Australian jurisdictions had abolished the death penalty. Over the last few years however, there have been voices calling for the reintroduction of capital punishment in Australia.⁷

¹ UN High Commissioner for Human Rights, <<http://www2.ohchr.org/english/law/>>.

² at the time of ratification a State Party to the Protocol can make certain reservations: see "Article 2: wartime" on page 25 & "Articles 4 & 5: complaints procedures" on page 27. See also: "Article 6: abolition is absolute (non-derogable)" on page 28.

³ see "Once abolished, always abolished" on page 13.

⁴ see "Obligation not to expose anyone to execution" on page 10.

⁵ the process of 'accession' involves the simultaneous signing and ratification of a treaty.

⁶ 'signing' a treaty is the first step in ratifying it, but does not bind the signatory country.

⁷ see [46].

6. Australia has an obligation under the Protocol to take 'all necessary measures' to ensure that the death penalty cannot be reintroduced. This paper argues that this obligation requires the federal Parliament to adopt the Protocol into domestic law binding the States. This will help to ensure that a populist State government cannot reintroduce capital punishment.
7. It is also worth noting that a recent poll in the *Bulletin* magazine found that a majority of Australians believe that the death penalty should *not* be reintroduced.⁸
8. In March 2009, Australia's Fifth Report to the United Nations Human Rights Committee is due to be considered in New York City.⁹ Adopting the Second Optional Protocol into domestic law *before* Australia appears before the Committee would help to reduce any adverse comment from the Committee. It would show that Australia is committed to the abolition of capital punishment.
9. A draft Bill to adopt the Second Optional Protocol into Australian law is annexed to this paper¹⁰ and is explained in more detail in "Death Penalty Abolition Amendment Bill 2008" on page 18. This Bill relies on the external affairs power of the federal Parliament and does not require the consent of the States.
10. The view of the Howard government was that all State governments should positively approve the federal Bill adopting the Protocol into domestic law. The NSW Council for Civil Liberties ('CCL') believes that this is not necessary, because all the States have already abolished the death penalty. However, in case the Rudd government takes the same view as the Howard government, then also annexed to this paper is a draft model State Bill requesting the adoption of the Second Optional Protocol into Australian law.¹¹

⁸ Patrick Carlyon, 'Swinging Voters' *The Bulletin* (Sydney) 1 March 2006. A majority of those polled (48.7% versus 46.5%) believed the death penalty should not be reintroduced in Australia. Curiously, a majority of the same people polled supported capital punishment (49.1% versus 46.8%).

⁹ see UN Human Rights Committee, 'Sessions', <<http://www2.ohchr.org/english/bodies/hrc/sessions.htm>>. The reporting obligation is pursuant to article 40 of the *International Covenant on Civil and Political Rights* (1966).

¹⁰ see "Appendix 2: Death Penalty Abolition Amendment Bill 2008" on page 32.

¹¹ see "Appendix 3: Death Penalty Abolition Amendment (Request) Bill 2008" below.

2. Second Optional Protocol

2.1 abolition before the Protocol

11. Prior to the Second World War, only 8 nations had abolished the death penalty.¹² The first country to do so was Venezuela in 1863.
12. The [*Universal Declaration of Human Rights*](#) (1948) does not mention the death penalty. This was largely because there was no international consensus on the abolition of capital punishment at the time.¹³
13. By the time the [*International Covenant on Civil and Political Rights*](#) ('ICCPR') was adopted by the UN General Assembly in 1966, the international abolitionist movement was growing in strength.¹⁴ The ICCPR restricts retentionist countries to using the death penalty only for the 'most serious crimes' and only after the final judgment of a court,¹⁵ to providing a process of commutation¹⁶ and prohibits the execution of pregnant women and juveniles below 18 years of age.¹⁷ Article 6 of the ICCPR is concerned with the 'inherent right to life' of every human being and reflects the underlying connection made between the right to life and capital punishment in the middle of the twentieth century.¹⁸
14. By the 1970s a need was perceived to create an international treaty that nations could sign, aiming at total global abolition of capital punishment. In 1977, the human rights group Amnesty International organised a highly influential international conference in Sweden on the issue of the death penalty and its abolition.¹⁹

¹² Venezuela, San Marino, Costa Rica, Panama, Ecuador, Uruguay, Colombia & Iceland: UN Secretary-General, *Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, (24 July 2000) UN Doc. E/2003/3, Annex 1.

¹³ William Schabas, *The Abolition of the Death Penalty in International Law* (2002, 3rd ed) 32-33.

¹⁴ Schabas, n 13, 46-77.

¹⁵ ICCPR article 6(2).

¹⁶ ICCPR article 6(4).

¹⁷ ICCPR article 6(5).

¹⁸ by the late 20th century the focus had shifted to viewing the death penalty as cruel and inhuman punishment: see NSW Council for Civil Liberties, *The Death Penalty in Australia and Overseas* (March 2005) BP 2005/3.

¹⁹ Schabas, n 13, 282.

2.2 adoption of the Protocol

15. The first draft of an optional protocol to the ICCPR was submitted to the UN General Assembly in 1980.²⁰ The draft was sponsored by Austria, Costa Rica, the Dominican Republic, the Federal Republic of Germany, Italy, Portugal and Sweden. It was attached to a draft resolution 'aiming at the ultimate abolition of the death penalty'.
16. Throughout the 1980s, the United Nations sponsored international talks to determine the need for, and shape of, any abolitionist protocol. A Special Rapporteur was appointed, Mr Marc Bossuyt, to guide the process. Mr Bossuyt wrote a report on the death penalty.²¹ The text of the draft optional protocol prepared by the Special Rapporteur, and attached to his report, was adopted without alteration by the UN.
17. In 1989, the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* was presented to the General Assembly of the United Nations.²² Australia was one of the 31 sponsors of the draft resolution. On the 15 December 1989 the Second Optional Protocol was adopted by the General Assembly with 59 votes in favour, 26 votes against and 48 abstentions.²³ Voting against the resolution were the US, China, Japan and a block of Islamic states.
18. New Zealand was the first country to ratify the Protocol on 22 February 1990. Australia was the third country to accede to the Protocol on 2 October 1990.²⁴ After receiving the required ten ratifications, the Protocol entered into force in international law on 11 July 1991.

²⁰ *Measures aiming at the ultimate abolition of capital punishment. Draft 2nd Optional Protocol to the International Covenant on Civil and Political Rights : draft resolution* (21 November 1980) UN Doc A/C.3/35/L/75. See also: Schabas, n 13, 174.

²¹ Marc Bossuyt, *Analysis Concerning the Proposition to Elaborate a Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (29 June 1987) UN Doc. E/CN.4/Sub.2/1987/20.

²² *Elaboration of a 2nd Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty: draft resolution* (10 November 1989) UN Doc A/C.3/44/L.42.

²³ UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (15 December 1989) UN Doc A/RES/44/128.

²⁴ Department of Foreign Affairs and Trade, *Australian Treaties Database*, (last updated 1/6/2006), <<http://www.info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/C0AA7BFB17F9DE95CA256B4C000ACD6E>>. Text of Protocol: <<http://www2.ohchr.org/english/law/ccpr-death.htm>>.

2.3 current status of the Protocol

19. As at 17 October 2007, 64 countries have ratified the Protocol, with a further 8 nations adding their signature to it. The full list of these 72 nations follows:

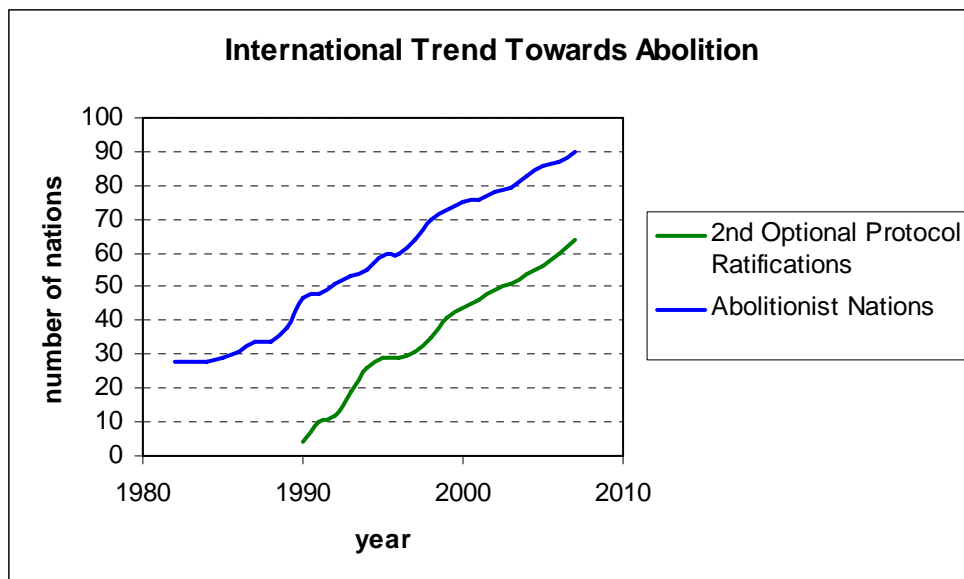
Participant	Signature	Ratification
Albania	.	17 Oct 2007
Andorra	5 Aug 2002	22 Sep 2006
Argentina	20 Dec 2006	.
Australia	.	2 Oct 1990
Austria	8 Apr 1991	2 Mar 1993
Azerbaijan	.	22 Jan 1999
Belgium	12 Jul 1990	8 Dec 1998
Bosnia & Herzegovina	7 Sep 2000	16 Mar 2001
Bulgaria	11 Mar 1999	10 Aug 1999
Canada	.	25 Nov 2005
Cape Verde	.	19 May 2000
Chile	15 Nov 2001	.
Colombia	.	5 Aug 1997
Costa Rica	14 Feb 1990	5 Jun 1998
Croatia	.	12 Oct 1995
Cyprus	.	10 Sep 1999
Czech Republic	.	15 Jun 2004
Denmark	13 Feb 1990	24 Feb 1994
Djibouti	.	5 Nov 2002
Ecuador	.	23 Feb 1993
Estonia	.	30 Jan 2004
Finland	13 Feb 1990	4 Apr 1991
France	.	2 Oct 2007
Georgia	.	22 Mar 1999
Germany	13 Feb 1990	18 Aug 1992
Greece	.	5 May 1997
Guinea-Bissau	12 Sep 2000	.
Honduras	10 May 1990	.
Hungary	.	24 Feb 1994
Iceland	30 Jan 1991	2 Apr 1991
Ireland	.	18 Jun 1993
Italy	13 Feb 1990	14 Feb 1995
Liberia	.	16 Sep 2005
Liechtenstein	.	10 Dec 1998
Lithuania	8 Sep 2000	27 Mar 2002
Luxembourg	13 Feb 1990	12 Feb 1992
Malta	.	29 Dec 1994

Participant	Signature	Ratification
Mexico	.	26 Sep 2007
Moldova	.	20 Sep 2006
Monaco	.	28 Mar 2000
Montenegro	.	23 Oct 2006
Mozambique	.	21 Jul 1993
Namibia	.	28 Nov 1994
Nepal	.	4 Mar 1998
Netherlands	9 Aug 1990	26 Mar 1991
New Zealand	22 Feb 1990	22 Feb 1990
Nicaragua	21 Feb 1990	.
Norway	13 Feb 1990	5 Sep 1991
Panama	.	21 Jan 1993
Paraguay	.	18 Aug 2003
Philippines	20 Sep 2006	.
Poland	21 Mar 2000	.
Portugal	13 Feb 1990	17 Oct 1990
Romania	15 Mar 1990	27 Feb 1991
San Marino	26 Sep 2003	17 Aug 2004
Sao Tome & Principe	6 Sep 2000	.
Serbia	.	6 Sep 2001
Seychelles	.	15 Dec 1994
Slovakia	22 Sep 1998	22 Jun 1999
Slovenia	14 Sep 1993	10 Mar 1994
South Africa	.	28 Aug 2002
Spain	23 Feb 1990	11 Apr 1991
Sweden	13 Feb 1990	11 May 1990
Switzerland	.	16 Jun 1994
FYROM	.	26 Jan 1995
Timor-Leste	.	18 Sep 2003
Turkey	6 Apr 2004	2 Mar 2006
Turkmenistan	.	11 Jan 2000
Ukraine	.	25 Jul 2007
United Kingdom	31 Mar 1999	10 Dec 1999
Uruguay	13 Feb 1990	21 Jan 1993
Venezuela	7 Jun 1990	22 Feb 1993

source data: UN High Commissioner for Human Rights²⁵

²⁵ UN High Commissioner for Human Rights, *Ratifications and Reservations*, <<http://www2.ohchr.org/english/bodies/ratification/12.htm>> (as at 17 October 2007).

20. Given the increasing number of nations ratifying the Second Optional Protocol, the international trend is unmistakably in favour of abolition, as the following graph demonstrates:



source data: UN High Commissioner for Human Rights & Amnesty International²⁶

²⁶ UN High Commissioner for Human Rights, n 25. Amnesty International, 'Death penalty: Countries abolitionist for all crimes', <<http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes>> (as at 26 September 2007).

3. Legal implications of abolition

21. Two important implications arise from abolishing the death penalty and ratifying the Second Optional Protocol. The first implication is that an abolitionist country is obliged to ensure that it exposes no one to the real risk of execution. The second implication is that the death penalty can never be reintroduced without violating international law.

3.1 Obligation not to expose anyone to execution

22. The UN Human Rights Committee is responsible for interpreting the ICCPR and the Second Optional Protocol.²⁷
23. In 1997, the UN Human Rights Committee found that the Second Optional Protocol obliges ratifying nations not to expose anyone to the real risk of execution for any offence. In 2003, the Committee found that the ICCPR itself places the same obligation on ratifying countries that have abolished the death penalty.
24. Both the ICCPR and the Protocol are silent on the law of extradition.²⁸ They do not expressly prohibit the extradition of a fugitive to a retentionist nation. There is no mention of extradition in the Special Rapporteur's report on the Protocol. In 1994, some members of the UN Human Rights Committee were of the view that the Protocol does not affect the law of extradition.²⁹ However, the Committee's jurisprudence has developed since then.
25. In 1997, the UN Human Rights Committee heard two important *refoulement* (return) cases against Australia. In *ARJ v Australia* and *GT v Australia* the Committee concluded that the Protocol carries with it an implication that Australia should not expose anyone to a real risk of capital punishment.³⁰
26. ARJ, an Iranian national, was convicted of drug supply in Australia. After he had served his sentence, Australia wanted to deport him to Iran. Mr J argued unsuccessfully in the Australian courts that he could face the death penalty if returned to Iran. Mr J complained to the UN Human Rights Committee, arguing that if Australia deported him to Iran then it would violate his right to life (ICCPR Article 6).

²⁷ Australia recognises the competence of the UN Human Rights Committee to receive and consider complaints by declaration made on 28 January 1993 under ICCPR Article 41 (complaints from States), ratification of the *First Optional Protocol to the ICCPR* (complaints from individuals) and the *Second Optional Protocol to the ICCPR* (Articles 4 & 5).

²⁸ for more information on capital punishment and extradition: see NSW Council for Civil Liberties, *The Death Penalty in Australia and Overseas* (March 2005) BP 2005/3.

²⁹ *Cox v Canada* (1994) UN Doc CCPR/C/52/D/539/1993 (joint opinion of Herndl & Sadi). See also: Schabas, n 13, 187.

³⁰ *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996 (no violation – no real risk of execution if returned to Iran); and, *GT v Australia* (1997) UN Doc CCPR/C/61/D/706/1996 (no violation – no real risk of execution if returned to Malaysia).

27. The beginning of Article 6 of the ICCPR states:

Article 6 – Right to Life

1. 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.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes...

28. The Committee observed that the ICCPR does not 'necessarily require Australia to refrain from deporting an individual to a State which retains capital punishment'.³¹ Reading paragraphs 6(1) and 6(2) together, the Committee concluded that Australia would only violate the ICCPR if it exposed Mr J to a real risk of being executed for offences other than 'the most serious crimes'.³² The Committee defined a 'real risk' as a 'necessary and foreseeable consequence'.³³ The Committee accepted the evidence of Australia that Mr J was not at risk of execution if returned to Iran and therefore found no violation of the ICCPR.
29. A few months after publishing its observations in *ARJ v Australia*, the Committee examined the case of *GT v Australia*. GT, an Australian citizen, was married to Mr T, a Malaysian citizen who was under threat of deportation from Australia to Malaysia. Mr T had been convicted in Australia of importing drugs from Malaysia. After he had served his sentence, Australia wanted to deport him to his homeland. Mrs T complained to the UN Human Rights Committee, arguing that if Australia deported her husband to Malaysia then it would violate his right to life (ICCPR Article 6) because drug offences in Malaysia attract a mandatory death sentence.
30. In this case, the Committee modified its interpretation of Australia's human rights obligations. The Committee observed that Australia has ratified the Second Optional Protocol, which imposes additional obligations. Whereas the ICCPR imposes an obligation not to expose anyone to the real risk of execution for offences other than 'the most serious crimes', the Protocol imposes a broader obligation not to expose anyone to the real risk of execution for any offence. By majority, the Committee found no violation of the ICCPR because it accepted Australia's evidence that Mr T would not face execution if returned to Malaysia.

³¹ *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996, [6.13].

³² *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996, [6.11].

³³ *ARJ v Australia* (1997) UN Doc CCPR/C/60/D/692/1996, [6.8].

31. In 2003, the Committee revisited and revised this jurisprudence. The case of *Judge v Canada* involved a US citizen, Mr Judge, who was sentenced to death in the US for murder. Mr Judge escaped his US prison and fled to Canada, where he committed two robberies and was sentenced to 10 years prison. When Canada tried to deport Mr Judge back to the United States, he sent a complaint to the UN Human Rights Committee alleging a violation by Canada of his right to life.³⁴
32. The Committee departed from its earlier decision in *ARJ* and reinterpreted paragraphs 6(1) and 6(2) of the ICCPR:³⁵
- Paragraph 1 of article 6, which states that “Every human being has the inherent right to life...” is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. ...For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application.
33. Unlike its earlier decision in *ARJ v Australia*, the Committee concluded that paragraph 6(2) only applies to those State parties that “have not abolished the death penalty”. Therefore abolitionist countries are obliged by paragraph 6(1) to protect life in all circumstances. The implied obligation on all abolitionist countries is that they will not expose anyone to the real risk of execution. This is the same obligation implied under the Second Optional Protocol. The obligation attaches whether an abolitionist party to the ICCPR has ratified the Protocol or not.³⁶
34. The Committee went on to conclude that Canada (an abolitionist country) would violate Mr Judge’s right to life by deporting him to the United States (a retentionist country) without first obtaining a guarantee that Mr Judge would not be executed.
35. In *Judge v Canada* the UN Human Rights Committee states that abolitionist nations are obliged to protect life *in all circumstances*. This clearly extends beyond *non-refoulement* (non-return) obligations in extradition or deportation cases and includes all actions by a State and its agents. This includes, for example, the actions of Australia Federal Police when cooperating or sharing information with foreign police agencies in retentionist countries.

³⁴ *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998.

³⁵ *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998, [10.4].

³⁶ *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998, [10.6].

3.2 Once abolished, always abolished

36. The Second Optional Protocol implicitly prohibits the reintroduction of the death penalty. Before a ratifying nation³⁷ could lawfully execute someone, that nation would have to withdraw from the Protocol. But, unusually, there is no withdrawal mechanism. This means that once a nation has ratified the Protocol, capital punishment is abolished forever.
37. Many international treaties contain procedural clauses detailing how a State Party can withdraw from that treaty. For example, article 12 of the *First Optional Protocol to the International Covenant on Civil and Political Rights* provides a procedure for denunciation of that protocol. The Second Optional Protocol has no such procedure.
38. When there is no explicit procedure for withdrawal from an international treaty, the default withdrawal mechanism from the [Vienna Convention on the Law of Treaties](#) applies.³⁸ The first way to withdraw is with the consent of all the parties to the treaty (article 54). If any party were to seek this consent to withdraw from the Second Optional Protocol, it is unlikely it would be granted by all the other parties.
39. The only other way to lawfully withdraw from a treaty is in accordance with article 56 of the Vienna Convention:

Article 56: Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
 - (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
 - (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.
-

³⁷ that is, any ratifying nation that has not reserved the right to execute in wartime pursuant to article 2 of the Protocol: see "Article 2" on p 25.

³⁸ [Vienna Convention on the Law of Treaties](#) (1969); [1974] ATS 2. Entry into force on 27 January 1980, <<http://www.austlii.edu.au/au/other/dfat/treaties/1974/2.html>>.

40. Under the terms of article 56(1)(a), any attempt to argue that the parties intended to admit withdrawal is unlikely to succeed. A treaty should be interpreted in good faith and in accordance with its object and purpose.³⁹ The very name of the Protocol states that it is a treaty for the *abolition* of the death penalty, not for its reintroduction. To confirm this view, recourse may be had to the preparatory work of the treaty.⁴⁰ Given that the UN adopted the Special Rapporteur's draft Optional Protocol without alteration, the Special Rapporteur's report is the principal *travaux préparatoires* of the Second Optional Protocol.⁴¹ The Special Rapporteur considered it unnecessary to include a provision in the Protocol to explicitly prohibit the reintroduction of capital punishment.⁴²

It is obvious that a State Party to the second optional protocol could not re-establish the death penalty without manifestly violating that protocol. Indeed, a re-establishment of capital punishment would be contrary to the very object and purpose of the second optional protocol.

41. Under the terms of article 56(1)(b), any attempt to argue that the nature of the Protocol requires the necessary implication of a denunciation mechanism is also unlikely to succeed. As described above, the nature of the Protocol is such that it does not contemplate reintroduction of the death penalty.
42. While this leads to the conclusion that there is no withdrawal mechanism from the treaty, such a conclusion is not a settled point of law and is yet to be tested. However, there is also *obiter dicta* from the UN Human Rights Committee⁴³ and comments from academic writers⁴⁴ that support this "once abolished, always abolished" interpretation.
43. It is also worth noting that a recent poll in the *Bulletin* magazine found that a majority of Australians believe that the death penalty should *not* be reintroduced.⁴⁵

³⁹ *Vienna Convention on the Law of Treaties* (1969) article 31(1).

⁴⁰ *Vienna Convention on the Law of Treaties* (1969) article 32.

⁴¹ See also Schabas, n 13, 181 (discussion of *travaux* of the Protocol).

⁴² Bossuyt, n 21, [162].

⁴³ *Cox v Canada* (31 October 1994) UN Doc CCPR/C/52/D/539/1993 (concurring joint opinion of Herndl & Sadi).

⁴⁴ Schabas, n 13, 182-3.

⁴⁵ Patrick Carlyon, 'Swinging Voters' *The Bulletin* (Sydney) 1 March 2006. See n 8 above.

4. Draft Bill to implement the Protocol

The federal Parliament should enact legislation to adopt the Second Optional Protocol into domestic law. That legislation should bind the States, in accordance with Australia's obligations under article 9 of the Protocol.⁴⁶

4.1 the case for adopting the Protocol

44. When a treaty is ratified it does not automatically become Australian law.⁴⁷ To become legally binding in Australia, legislation must be passed incorporating the treaty, in part or whole, into Australian law.⁴⁸ Federal Parliament can choose to make that enabling legislation binding on the federal government, on the territories⁴⁹ and even on the States.⁵⁰ While such legislation can be passed without the approval of all the States,⁵¹ the process can also be done cooperatively.
45. When Australia acceded to the Second Optional Protocol in 1990, the death penalty had been abolished federally, in all the territories and in all the States.⁵² In 1990, the Australian foreign minister expressed the opinion that the Protocol simply reflected the local situation in Australia.⁵³ There appeared to be no need to enact legislation to adopt the Protocol into Australian law.

⁴⁶ see "Article 9: federal jurisdictions" on page 29.

⁴⁷ *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ).

⁴⁸ using the 'external affairs power': *Constitution* s 51(xxix). See also: Leslie Zines, *The High Court and the Constitution* (1997, 4th ed), 275-92; also, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (2002, 3rd ed), 762-802.

⁴⁹ using the 'territories power': *Constitution* s 122.

⁵⁰ using the 'external affairs power' [*Constitution* s 51(xxix)] and relying on the constitutional rule that federal laws trump state laws [*Constitution* s 109]. See Victorian Parliament, Federal-State Relations Committee, *Report on International Treaty Making and the Role of the States* (2 October 1997) [1.46],

<<http://www.parliament.vic.gov.au/fsrc/report1/body/chapter1.htm#ch1sub6>>. See also: Blackshield & Williams, n 48, 390-401.

⁵¹ e.g. *Human Rights (Sexual Conduct) Act 1994* (Cth) was used to override those sections of Tasmania's *Criminal Code* that criminalised homosexuality.

⁵² see NSW Council for Civil Liberties, *The Death Penalty in Australia and Overseas* (March 2005) BP 2005/3.

⁵³ Evidence to Estimates Committee B, Commonwealth, Senate, 4 September 1991, 70 (Senator Gareth Evans, Minister for Foreign Affairs and Trade).

46. But despite the fact that Australia has signed the Protocol, there are still regular calls for the States to reintroduce capital punishment. For example, there have been calls for a referendum on the death penalty in Queensland,⁵⁴ Western Australia⁵⁵ and New South Wales.⁵⁶ In 2003, the Australian Prime Minister John Howard encouraged the States to debate reintroduction of the death penalty.⁵⁷ The rise of the One Nation party has added fuel to this debate.⁵⁸ The South Australian branch of One Nation went to the 2006 State elections with a policy of *mandatory* capital punishment for 'manufacturers & traffickers of hard drugs, and perpetrators of serial homicides, premeditated homicides and child homicides'.⁵⁹
47. If a State legislature introduced a *mandatory* death penalty for any crime, there are no national or State-based Bills of Rights to prohibit such a law.⁶⁰ It is not even certain that the High Court could strike down such a law as unconstitutional. The High Court might apply the *Kable* principle to ensure that State parliaments do not interfere in judicial sentencing discretion,⁶¹ however the *Kable* principle has been continuously narrowed to the point of non-existence.⁶²
48. Article 1(2) of the Second Optional Protocol commits Australia to take 'all necessary measures' to abolish the death penalty. The NSW Council for Civil Liberties believes that adopting the Second Optional Protocol into domestic law binding the Australian States is a 'necessary measure' in order to comply with Article 9 of the Protocol.
49. Article 9 of the Second Optional Protocol makes it clear that the States must also abolish the death penalty. The NSW Council for Civil Liberties believes that the Australian federal Parliament has an international obligation to ensure that the death penalty cannot be reintroduced in the States.

⁵⁴ 'Anderson, Downer at odds over penalty', *Canberra Times*, 2 August 1999, 5.

⁵⁵ Joe Spagnolo, 'Killers free to roam', *Sunday Times* (Perth), 11 November 2007, 8 (Shadow Police Minister calls for reintroduction); and, Amanda Banks, 'Most want death penalty back Westpoll', *West Australian* (Perth) 11 July 2006, 8. See also: Selina Day, 'Court rules out death penalty referendum', *AAP*, 16 March 2000.

⁵⁶ Referendum (Death Penalty) Bill 2002 (NSW): private members bill introduced into the NSW Parliament by One Nation member of the Legislative Council, Mr David Oldfield.

⁵⁷ Cynthia Banham and Robert Wainwright, 'PM ignites death penalty furore', *Sydney Morning Herald* (Sydney), 9 August 2003, 1, <<http://www.smh.com.au/articles/2003/08/08/1060145865692.html>>.

⁵⁸ see: ABC News, 'Death penalty debate a waste of time says McGinty', *News Online* (13 June 2003) <<http://www.abc.net.au/news/newsitems/200306/s878824.htm>>; Colleen Egan, 'MP's call for death penalty disowned', *The Australian* (Sydney), 26 July 2002, 4.

⁵⁹ One Nation, *Policy Document* (14 March 2005) <<http://sa.onenation.com.au/policies.htm>>.

⁶⁰ while Victoria's draft *Charter of Rights and Responsibilities* included a paragraph prohibiting capital punishment, the enacted version does not.

⁶¹ *Kable v DPP (NSW)* (1996) 189 CLR 51 (State Parliament may not confer powers on State Supreme Courts that are inconsistent with the exercise of federal judicial power).

⁶² see *Fardon v AG (Old)* [2004] HCA 46, [190] (Kirby J dissenting).

50. For more abundant caution, it is wise to enact federal legislation adopting the Second Optional Protocol *before* a State reintroduces the death penalty. If a State reintroduced the death penalty, the federal Parliament could choose to pass legislation to override the State law at that point.⁶³ However, this would be very much 'after the horse has bolted' and it is not entirely clear what would happen if a State court passed a death sentence *before* such federal legislation could be enacted. The High Court may or may not allow the federal Parliament to make such a criminal law retrospective.⁶⁴ There is no guarantee that the High Court (or federal Parliament) could save the life of the condemned citizen.
51. It is simply not enough that Australia has acceded to the Second Optional Protocol, because until the Protocol is adopted into Australian law it is not legally binding.
52. A draft Bill to adopt the Second Optional Protocol into Australian law is annexed to this paper⁶⁵ and is explained in more detail below.

4.2 Death Penalty Abolition Act 1973

53. The *Death Penalty Abolition Act 1973* (Cth)⁶⁶ was first introduced into the federal Parliament in 1968. It finally passed both houses in 1973 and became law on 18 September 1973. The effect of the Act is to abolish the death penalty for all federal offences.⁶⁷ The Act also binds the territories.⁶⁸
54. The Act does not bind the States. When the Act was passed, the Second Optional Protocol did not exist and it was unclear whether the federal Parliament had the power to override State criminal laws. The High Court of Australia has since confirmed the Parliament has such power. In the case of *Croome v Tasmania*,⁶⁹ the Court upheld federal legislation that overrode State laws criminalising homosexuality in Tasmania.⁷⁰ To achieve this end, the federal Parliament relied on its external affairs power to adopt parts of the *International Covenant on Civil and Political Rights* into domestic law⁷¹ and the constitutional provision that federal laws trump State laws.⁷²

⁶³ Michael Walton & David Leung, 'The PM could protect us from the death penalty', *UNSW Council for Civil Liberties* (August 2003)

<<http://www.nswccl.org.au/unswwcl/issues/dp090803.php>>.

⁶⁴ see Zines, n 48, 210-2.

⁶⁵ see "Appendix 2: Death Penalty Abolition Amendment Bill 2008" on page 32.

⁶⁶ see "Appendix 1: *Death Penalty Abolition Act 1973*" on page 31.

⁶⁷ *Death Penalty Abolition Act 1973* (Cth) s 4.

⁶⁸ *Death Penalty Abolition Act 1973* (Cth) s 3(1).

⁶⁹ *Croome v Tasmania* (1997) 191 CLR 119.

⁷⁰ *Human Rights (Sexual Conduct) Act 1994* (Cth). See also, [44].

⁷¹ external affairs power: *Constitution* s 51(xxix).

⁷² inconsistency of laws: *Constitution* s 109.

4.3 Death Penalty Abolition Amendment Bill 2008

55. The Death Penalty Abolition Amendment Bill 2008⁷³ amends the *Death Penalty Abolition Act 1973* (Cth) to adopt the Second Optional Protocol into domestic law, relying on the external affairs power of the Parliament. The Bill binds the States, in accordance with article 9 of the Second Optional Protocol.⁷⁴ Each section of the Bill is outlined below.

4.3.1 Sections 1, 2 and 3

56. These sections are common to all simple Bills. Section 1 provides a 'short name' for the Bill. Section 2 States that the Bill will come into law after it has been passed by both Houses of Parliament and signed into law by the Governor General. Section 3 explains that Schedule 1 amends the *Death Penalty Abolition Act*.

4.3.2 Section 4 (Preamble)

Insert before section 1:

Preamble

- (1) Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,
- (2) Recalling Article 3 of the *Universal Declaration of Human Rights*, adopted on 10 December 1948, and Article 6 of the *International Covenant on Civil and Political Rights*, adopted on 16 December 1966,
- (3) Noting that Article 6 of the *International Covenant on Civil and Political Rights* refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,
- (4) Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,
- (5) Noting that the death penalty has been abolished in all Australian jurisdictions since 1985,
- (6) Noting that Australia, desirous to undertake an international commitment to abolish the death penalty, has acceded to the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty*, which entered into force for Australia and internationally on 11 July 1991,
- (7) Recognising Australia's international obligations under the *Second Optional Protocol* to ensure that in all circumstances Australia exposes no one to the real risk of execution,

The Parliament of Australia enacts:

57. Section 4 inserts a Preamble into the *Death Penalty Abolition Act*. The purpose of the Preamble is to state Parliament's intention for enacting this legislation. The Preamble assists the courts in interpreting the will of Parliament.

58. The first four recitals of the Preamble come directly from the recitals of the Second Optional Protocol.

⁷³ see "Appendix 2: Death Penalty Abolition Amendment Bill 2008" on page 32.

⁷⁴ see "Article 9: federal jurisdictions" on page 29.

59. The fifth recital notes that the death penalty has already been abolished throughout Australia. The sixth recital notes that Australia has ratified the Second Optional Protocol and incorporates the final recital of the Protocol. The seventh recital acknowledges the implied obligation under the Protocol to ensure that no one is exposed to the real risk of the death penalty.⁷⁵

4.3.3 Section 5 (Application of the Act)

Repeal section 3 and substitute:

3 Application of this Act

(1) This Act applies within and outside Australia and binds the Crown in right of the Commonwealth, of each of the States and of every external Territory.

(2) This Act applies in relation to, and in relation to offences under, the laws of the Commonwealth, of each of the States and of every external Territory, and, to the extent to which the powers of the Parliament permit, in relation to, and in relation to offences under, Imperial Acts.

(3) This Act applies in relation to offences committed before, on or after the date of commencement of this Act, including offences in respect of which proceedings are pending at that date, and if, on that date, a person is under sentence of death for an offence in relation to which this Act applies, the sentence has effect as if it were a sentence of imprisonment for life.

(4) In this section:

States includes the Australian Capital Territory and the Northern Territory.

60. Section 3 of the *Death Penalty Abolition Act* would be replaced, though it remains substantially the same. The main change is that it extends the operation of the Act to bind the States.
61. Subsection 1 retains the application of the law 'within and outside Australia'. The subsection also ensures that the Act binds the federal government, the States and the external territories. Note that subsection 4 says that 'States' includes the Northern Territory and the Australian Capital Territory.
62. Subsection 2 extends the application of the Act to State laws as well as federal and territory laws. For more abundant caution, the mention to Imperial Acts is retained, in case there are prisoners to whom this still applies.
63. Subsection 3 reproduces the old subsection 4 *verbatim*. This subsection is preserved, just in case there are still prisoners in Australia whose death sentences were commuted by the 1973 Act.
64. Subsection 4 ensures that the Northern Territory and Australian Capital Territory continue to be bound by this Act.

⁷⁵ see "Obligation not to expose anyone to execution" on page 10.

4.3.4 Section 6 (Object, Operation and Interpretation)

After section 3, insert:

3A Object and Operation of this Act

(1) The object of this Act is to give effect to the *Second Optional Protocol to the International Covenant on Civil and Political Rights*.

(2) The operation of this Act is based on the legislative power the Commonwealth Parliament has under paragraph 51(xxix) of the Constitution.

(3) In this section:

Second Optional Protocol to the International Covenant on Civil and Political Rights refers to the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty*, that was adopted by resolution 44/128 of 15 December 1989 at the Forty-fourth session of the General Assembly of the United Nations and that entered into force on 11 July 1991, being the Optional Protocol a copy of the English text of which is set out in the Schedule to this Act.

Note: Australia acceded to the *Second Optional Protocol to the International Covenant on Civil and Political Rights* on 2 October 1990.

3B Interpretation of this Act

(1) When interpreting this Act, Australian courts and tribunals may consider international law and the judgments of relevant domestic, foreign and international courts.

(2) When considering foreign judgments, Australian courts and tribunals must prefer the judgments of jurisdictions that have abolished the death penalty over the judgments of jurisdictions that retain the death penalty.

(3) In this section:

Relevant domestic, foreign and international courts means courts and tribunals with competence to adjudicate on human rights and humanitarian law, including the International Court of Justice and the United Nations Human Rights Committee.

65. Section 6 introduces two new sections: 3A and 3B. The purpose of section 3A is to make it clear that the Second Optional Protocol is being adopted into domestic law. The purpose of section 3B is to aid courts in the interpretation of the Act.
66. Subsection 3A(1) explicitly states that the object of the amending Act is to adopt the Second Optional Protocol into Australian law.
67. Subsection 3A(2) has no legal effect,⁷⁶ but merely asserts that Parliament believes it has the power to introduce this law by exercising its external affairs power. As noted in paragraphs 44 and 54 above, the High Court of Australia has confirmed that the external affairs power can be used to introduce international treaties into Australian law, thereby overriding State laws.⁷⁷

⁷⁶ see *Australian Communist Party v Commonwealth* ('Communist Party Case') (1951) 83 CLR 1; also *Heiner v Scott* (1914) 19 CLR 381, 393 (Griffith CJ): 'the stream cannot rise above its source'.

⁷⁷ see also *Commonwealth v Tasmania* ('Tasmanian Dams Case') (1983) 158 CLR 1.

68. The view of the Howard government was that all State parliaments should positively approve the federal Bill adopting the Protocol into domestic law. Should this still be the view of the government, then the suggested method is for the State Parliaments to *request* the federal Parliament to enact legislation to adopt the Second Optional Protocol. If this suggestion is accepted, then subsection 3A(2) should also include a reference to paragraph 51(xxxviii) of the Constitution. In relation to the 'request power', see "Death Penalty Abolition Amendment (Request) Bill 2008" on page 22.
69. Subsection 3A(3) clearly identifies which international treaty is being adopted into Australian law. This ensures that there can be no confusion.
70. The note at the end of section 3A has no legal force, it merely serves as information.
71. Subsection 3B(1) permits Australian courts and tribunals to consider international law and the jurisprudence of foreign and international courts and tribunals. The Australian courts are given a discretion to consider international and foreign law and jurisprudence, but that law and jurisprudence is not binding on Australian courts.
72. Subsection 3B(2) mandates that, when considering the judgments of foreign courts, an Australian court must prefer the interpretation given by courts of abolitionist nations. For example, this means that the interpretation of the Supreme Court of Canada (an abolitionist country) must be preferred over the interpretation of the Supreme Court of the United States of America (a retentionist country). This rule ensures that a decision supporting execution cannot be preferred over a decision supporting abolition. This subsection does not apply to international courts (which do not impose death as punishment) or to domestic law or courts (because capital punishment is abolished throughout Australia).
73. Subsection 3B(3) explains that 'relevant domestic, international and foreign courts' are those that are competent in adjudicating on human rights and humanitarian law. It also includes the decisions of competent tribunals. The list of courts in this subsection is not exhaustive. The UN Human Rights Committee is singled out because it is the UN Treaty Monitoring body responsible for monitoring and interpreting the Second Optional Protocol.⁷⁸ When interpreting this Act, also of particular interest will be decisions of the International Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights and the Supreme Court of Canada.

4.3.5 Section 7 (Schedule the Protocol)

74. Section 7 appends the Second Optional Protocol to the *Death Penalty Abolition Act*. This is similar to the way the ICCPR is appended to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

⁷⁸ see Articles 3, 4 and 6 of the Second Optional Protocol.

4.4 Death Penalty Abolition Amendment (Request) Bill 2008

75. The NSW Council for Civil Liberties believes that this Request Bill is unnecessary. CCL believes that it is sufficient for the federal Parliament to use its external affairs power to adopt the Second Optional Protocol into domestic law. This means that there is no need for State parliaments to pass complementary legislation.
76. The Howard government was of the view that all States must expressly agree to the adoption of the Second Optional Protocol. To ensure bipartisan support, the Federal Parliamentary Cross Party Working Group Against the Death Penalty made enquiries of the various State governments and oppositions. Before a consensus could be reached, the 2007 federal election was called.
77. Given the Howard government's view, CCL preferred a model whereby the federal Parliament relied on its constitutional 'request power' to adopt the Second Optional Protocol into Australian law. A State Request Bill was drafted and is attached to this paper.
78. CCL reiterates its view that this Request Bill is unnecessary, however the draft Request Bill is included in this paper for the sake of completeness – in case the Rudd government requires State legislation as well.

4.4.1 how does the request work?

79. Section 51(xxxviii) of the Constitution provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

80. At the outset it should be noted that the words referring to the Federal Council of Australasia are of no significance. The Federal Council did not possess any powers exercisable at the establishment of the Constitution because it ceased to exist following the repeal of *Federal Council of Australasia Act 1885 (Imp)* by covering clause 7 of the Constitution. Furthermore, even if the Council had existed and enjoyed powers, that would be of no consequence considering that any such powers would have been exercisable by the United Kingdom Parliament.⁷⁹

⁷⁹ see *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340, 376.

81. A pre-condition for section 51(xxxviii) coming into operation is the lack of any legislative power existing in any body other than the United Kingdom Parliament.⁸⁰ Prior to the establishment of the Constitution, the legislation authorising the death penalty applied by paramount force in Australia. By virtue of section 2 of the *Colonial Laws Validity Act* 1865 (Imp) the Colonial Parliaments therefore lacked the power to abolish the death penalty.

4.4.2 reservations about relying on the request power

82. The primary difficulty with relying on section 51(xxxviii) for the purposes of extending the *Death Penalty Abolition Act* 1973 (Cth), so that it applies to offences under the laws of the States, is that a request is technically unnecessary. The Commonwealth clearly enjoys the power to make such an extension under the external affairs power: section 51(xxix).

83. However, in the spirit of cooperative federalism and in consultation with the States, the Request Bill is intended to remove any suggestion that States' rights are being ignored in the adoption of the Second Optional Protocol into domestic law.

4.4.3 does the Federal Parliament have to accede to a request?

84. If a request is made, the Commonwealth Parliament clearly is not required to enact the law requested. The terms of section 51(xxxviii) make it clear that a request merely vests Parliament with a power.

4.4.4 effect of repeal of legislation of requesting legislation

85. A State Parliament that enacts legislation requesting the Commonwealth Parliament to introduce legislation to amend the *Death Penalty Abolition Act* 1973 (Cth) so that it became binding on the States is clearly competent to repeal that legislation. However, this would not have any effect on Commonwealth legislation passed as a result of that request legislation. As the words of section 51(xxxviii) make clear: a request is merely a condition precedent to a law falling within section 51(xxxviii).⁸¹

4.4.5 does there need to be unanimity on the part of the States?

86. It is unclear whether the Commonwealth could make a law falling within the ambit of section 51(xxxviii) if one or more of the States declined to make a request for the Commonwealth to exercise power under section 51(xxxviii). Section 51(xxxviii) affords no clear answer to this question. However, it is important to note that the terms of the section provide that power accrues to the Commonwealth if a request is made by "all of the States directly concerned". One commentator has suggested that this means that a request can be made by one State alone.⁸²

⁸⁰ see K Booker, "Section 51(xxxviii) of the Constitution" (1981) 4 *University of New South Wales Law Journal* 91, 92-93.

⁸¹ Booker, above n 80, 101-102.

⁸² M Stokes, "Are there Separate State Crowns?" (1998) 20 *Sydney Law Review* 127, 128.

5. Anatomy of the Second Optional Protocol

5.1 introduction

87. This overview of the provisions of the Second Optional Protocol is only introductory. The most authoritative text on the Protocol is the report of the Special Rapporteur,⁸³ which serves as the principal *travaux préparatoires*.⁸⁴ There are also useful academic commentaries on the Protocol.⁸⁵

5.2 preamble

88. The recitals that make up the preamble legally constitute part of the text of the Protocol.⁸⁶ As such, they help to identify the object and purpose of the Protocol.

89. The preamble reinforces the view that abolition of the death penalty is a desirable and progressive human rights measure that enhances human dignity and enjoyment of the right to life. The third and fourth recitals echo the general comments of the UN Human Rights Committee in 1982.⁸⁷

90. The final recital states that, by ratifying this protocol, State Parties demonstrate an international commitment to abolish the death penalty. According to the Special Rapporteur, this recital expresses the purpose of the Protocol.⁸⁸

5.3 Article 1: abolition of the death penalty

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

91. This article is the main substantive provision of the Protocol. However, it is subject to any reservations made under article 2 of the Protocol. Since Australia has not made any such reservations, article 1 in its entirety binds Australia.

⁸³ Bossuyt, n 21.

⁸⁴ see [40].

⁸⁵ Schabas, n 13, 182-7. See also: Roger Hood, *The Death Penalty: A Worldwide Perspective* (2002, 3rd ed).

⁸⁶ *Vienna Convention on the Law of Treaties* (1969) article 31(2).

⁸⁷ Bossuyt, n 21, [156]; referring to UN Human Rights Committee, *General Comment 6(16)* (27 July 1982) UN Doc CCPR/C/21/Add.1, [6],

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument)>.

⁸⁸ Bossuyt, n 21, [156].

92. The first paragraph of this article is the 'essential object' of the Protocol.⁸⁹ It confers an individual right.⁹⁰ The paragraph is also self-executing (in those nations that do not require enabling legislation for ratified treaties to take domestic legal effect).⁹¹
93. The second paragraph commits a State Party to the abolition of capital punishment. 'All necessary measures' should be taken to achieve this end. When this paragraph is read with article 9 of the Protocol, it is clear that the Australian federal Parliament has an international obligation to ensure that the death penalty cannot be reintroduced in the States.
94. The use of the phrase 'within its jurisdiction' in this article amounts to an international obligation upon the State Party not to execute anyone *itself*. The Protocol is silent on the law of extradition.⁹² The Protocol does not expressly prohibit the extradition of a fugitive to a retentionist nation. However, the jurisprudence of the UN Human Rights Committee implies an obligation under the Protocol to ensure no one is exposed to the real risk of execution.⁹³

5.4 Article 2: wartime exception

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
 2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.
 3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.
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95. This article permits a State Party to reserve the right to apply the death penalty in wartime for very serious crimes.⁹⁴ This is the only exception to the rule of total abolition under the Protocol.⁹⁵ The exception does not override a nation's obligations under international humanitarian law, therefore the *Geneva Conventions* continue to apply with full force.⁹⁶

⁸⁹ Bossuyt, n 21, [160].

⁹⁰ Bossuyt, n 21, [159].

⁹¹ Bossuyt, n 21, [158]-[159].

⁹² for more information on capital punishment and extradition: see NSW Council for Civil Liberties, *The Death Penalty in Australia and Overseas* (March 2005) BP 2005/3.

⁹³ see "Obligation not to expose anyone to execution" on page 10.

⁹⁴ Bossuyt, n 21, [163].

⁹⁵ Bossuyt, n 21, [166].

⁹⁶ Bossuyt, n 21, [167]. See also Schabas, n 13, 185.

96. The Special Rapporteur noted that the [*Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty*](#),⁹⁷ which abolishes the death penalty in the European Union, provides a similar wartime exception. The Special Rapporteur believed that a wartime exception would make it possible for a larger number of nations to ratify the Protocol.⁹⁸
97. The reservation is an 'opt-in' exception. Only those nations that 'opt-in' may take advantage of the exception. Only two nations have entered a reservation under article 2: Azerbaijan and Greece.⁹⁹ Spain, Malta and Cyprus also entered reservations, but have since withdrawn them.¹⁰⁰
98. A State Party can only make a reservation at the time of ratifying the Protocol, otherwise it is bound to total abolition with no exceptions. The Special Rapporteur was of the opinion that to allow a Party to make such a reservation after ratification 'would very likely be incompatible with the object and purpose of the second optional protocol'.¹⁰¹
99. The exception only covers the 'most serious' crimes 'of a military nature'. This means that it cannot be used to reintroduce the death penalty for civilian crimes during times of war, for example murder.¹⁰²
100. Because the exception is only for crimes committed 'during wartime', it cannot be used to reintroduce the death penalty for crimes committed during peacetime, even if the offence is serious and 'of a military nature'. It is not clear whether the exception can be invoked during a civil war.¹⁰³
101. Paragraphs 2 and 3 set out the procedure for a State Party to make a reservation and to notify the UN of its exercise of the reservation.
102. This exception does not apply to Australia because Australia did not enter the necessary reservation upon ratification.

⁹⁷ Council of Europe: <<http://conventions.coe.int/Treaty/en/Treaties/Html/114.htm>>.

⁹⁸ Bossuyt, n 21, [165].

⁹⁹ UN High Commissioner for Human Rights, n 25. See also: Schabas, n 13, 185-6.

¹⁰⁰ UN High Commissioner for Human Rights, n 25. See also: Schabas, n 13, 185-6.

¹⁰¹ Bossuyt, n 21, [166].

¹⁰² Bossuyt, n 21, [167].

¹⁰³ Schabas, n 13, 183-4.

5.5 Article 3: reporting obligations

103. This article ensures that State Parties include information about the Second Optional Protocol in their regular quadrennial reports to the Human Rights Committee under the *International Covenant on Civil and Political Rights*.
104. In March 2009, Australia's Fifth Report to the United Nations Human Rights Committee is due to be considered by the Committee in New York City.¹⁰⁴ Adopting the Second Optional Protocol into domestic law *before* Australia appears before the Committee would help to reduce any adverse comment from the Committee. It would show that Australia is committed to the abolition of capital punishment and to its international obligations.

5.6 Articles 4 & 5: complaints procedures

105. Article 4 provides for a State Party to make a complaint to the UN Human Rights Committee that another State Party is violating the Protocol. Article 4 only applies to nations which allow the Human Rights Committee to hear such complaints against them under article 41 of the *International Covenant on Civil and Political Rights*. At the time of signing the Protocol, a State Party can opt-out of this complaints procedure. Australia is subject to article 4 complaints.
106. As at 20 July 2007, 48 nations have made a declaration recognising the competence of the Human Rights Committee to hear complaints against them under article 41.¹⁰⁵ Thirty (30) of those 48 nations, Australia among them,¹⁰⁶ have also ratified the Second Optional Protocol. None of those 30 nations have made a reservation to article 4 of the Second Optional Protocol and so all 30 countries, including Australia, are subject to complaints being made by other State Parties to the UN Human Rights Committee under article 4.
107. Article 5 provides for individuals to make a complaint to the UN Human Rights Committee against a State Party. Article 5 only applies to nations that have ratified the *First Optional Protocol to the International Covenant on Civil and Political Rights*. At the time of signing the Protocol, a State Party can opt-out of this complaints procedure. Australia is subject to article 5 complaints.

¹⁰⁴ see UN Human Rights Committee, 'Sessions', <<http://www2.ohchr.org/english/bodies/hrc/sessions.htm>>. The reporting obligation is pursuant to article 40 of the *International Covenant on Civil and Political Rights* (1966). See also, NSWCCCL, 'ICCPR Shadow Report', <http://www.nswcccl.org.au/publications/iccpr_shadow.php>.

¹⁰⁵ UNHCHR, n 25.

¹⁰⁶ Australia made a declaration under article 41 of ICCPR on 28 January 1993: <http://www.bayefsky.com/.html/australia_t2_ccpr.php>.

108. As at 11 October 2007, 110 nations have ratified the First Optional Protocol.¹⁰⁷ Fifty-six (56) of those 110 nations, Australia among them,¹⁰⁸ have also ratified the Second Optional Protocol. None of those 56 nations have made a reservation to article 5 of the Second Optional Protocol and so all 56 countries, including Australia, are subject to complaints being made by individuals to the UN Human Rights Committee under article 5.
109. The Special Rapporteur was of the opinion that an individual could complain to the UN Human Rights Committee when he or she was merely 'subject to a potential threat of execution'.¹⁰⁹ This is because, obviously, an executed person cannot make a complaint to anyone. He also noted it would be an automatic violation of the Protocol if anyone within the jurisdiction of a State Party to the Protocol was sentenced to death.

5.7 Article 6: abolition is absolute (non-derogable)

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.
 2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.
-

110. Paragraph 1 ensures that all the rights and freedoms expressed in the *International Covenant of Civil and Political Rights*, such as the right to a fair trial, remain in force. It also ensures that the protections under the Geneva Conventions, with respect to both prisoners of war and civilians, remain in force.¹¹⁰
111. Paragraph 2 makes it abundantly clear that the individual human right protected by the optional protocol (that is the right not to be executed) cannot be suspended 'in time of public emergency which threatens the life of the nation' under article 4 of the *International Covenant of Civil and Political Rights*.¹¹¹ However, that individual right can be suspended if a State Party made a reservation under article 2 of the optional protocol when it ratified the optional protocol.

¹⁰⁷ UNHCHR, n 25.

¹⁰⁸ Australia ratified the First Optional Protocol on 25 September 1991: UNHCHR, n 25.

¹⁰⁹ Bossuyt, n 21, [175].

¹¹⁰ Bossuyt, n 21, [177].

¹¹¹ Bossuyt, n 21, [178].

5.8 Articles 7 & 8: procedural issues

112. Article 7 deals with the process of signing, ratification and accession to the Protocol. It is a prerequisite to signing, ratifying or acceding to the Protocol for the State Party to have ratified or acceded to the ICCPR.
113. Article 8 deals with the process by which the Protocol comes into force. The Protocol came into force generally in international law on 11 July 1991.

5.9 Article 9: federal jurisdictions

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

114. This article is a standard clause included in all the binding documents of the *International Bill of Human Rights*.¹¹² It ensures that federal governments are held responsible for the human rights violations of their constituent States.¹¹³ Because Australia is a federation of states, this is a highly significant clause.
115. Such clauses have been controversial in the past.¹¹⁴ Australia originally filed a reservation limiting the effect of the equivalent clause in the *International Covenant on Civil and Political Rights*.¹¹⁵ That reservation was withdrawn on 6 November 1984 and replaced with a 'federal declaration':¹¹⁶

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

¹¹² ICESCR article 28, ICCPR article 50, 1st Optional Protocol to ICCPR article 10 & 2nd Optional Protocol to ICCPR article 9. Note: UDHR is a *declaration* of the UN General Assembly, not a treaty signed by nations, and is therefore not binding on any nation – though it does hold great moral authority.

¹¹³ e.g. *Jazairi v Canada* (26 October 2004) UN Doc. CCPR/C/82/D/958/2000, at [7.3] (in reference to ICCPR art. 50: '...a substantive violation of the Covenant by a provincial authority engages the State party's international responsibility to the same degree as an act of its federal authorities.').

¹¹⁴ see discussion on 'federal clauses': Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (November 1995) [13.7]-[13.17], <<http://www.austlii.edu.au/au/other/dfat/reports/tortcon.html>>.

¹¹⁵ see UN Treaty Series, vol 1197, 411; reproduced at <http://www.bayefsky.com/html/australia_t2_ccpr.php>.

¹¹⁶ see UN High Commissioner for Human Rights, *Declarations and Reservations*, <http://www2.ohchr.org/english/bodies/ratification/4_1.htm> (Australia's reservations).

116. The Second Optional Protocol does not permit such reservations. Article 2 states that no reservations, other than the wartime exception, can be made to the Protocol.¹¹⁷ This means that the mandatory nature of article 9 is not weakened by any federal declaration or federal clause. In other words, there is a positive obligation upon Australia at international law to ensure that the death penalty is abolished in all the States and all the territories.

5.10 Articles 10 & 11: housekeeping issues

117. Article 10 outlines the duties of the Secretary-General of the United Nations in relation to the State Parties to the Protocol.
118. Article 11 is a standard UN clause ensuring that the Protocol is translated into the six official languages of the UN and sent to the government of every UN member state.

¹¹⁷ see "Article 2: wartime" above on page 25.

Appendix 1: *Death Penalty Abolition Act 1973*

Death Penalty Abolition Act 1973

Act No. 100 of 1973 (as amended)

An Act to abolish Capital Punishment under the Laws of the Commonwealth and under certain other Laws in relation to which the Powers of the Parliament extend

1 Short title

This Act may be cited as the *Death Penalty Abolition Act 1973*.

2 Commencement

This Act shall come into operation on the day on which it receives the Royal Assent.*

3 Application of Act

- (1) This Act applies within and outside Australia and extends to all the Territories.
- (2) This Act applies in relation to, and in relation to offences under, the laws of the Commonwealth and of the Territories, and, to the extent to which the powers of the Parliament permit, in relation to, and in relation to offences under, Imperial Acts.
- (3) *repealed***
- (4) This Act applies in relation to offences committed before, on or after the date of commencement of this Act, including offences in respect of which proceedings are pending at that date, and if, on that date, a person is under sentence of death for an offence in relation to which this Act applies, the sentence has effect as if it were a sentence of imprisonment for life.

4 Abolition of death penalty

A person is not liable to the punishment of death for any offence.

5 Substitution of imprisonment for life

Where by any law in relation to which this Act applies (including a provision that would, but for this Act, have effect by virtue of such a law) it is provided that a person is liable to the punishment of death, the reference to the punishment of death shall be read, construed and applied as if the penalty of imprisonment for life were substituted for that punishment.

* date of assent and commencement: 18 September 1973.

** section 3(3) was repealed by the *Law and Justice Legislation Amendment Act 1997* (Cth).

The section originally read:

(3) This Act does not apply in relation to, or in relation to offences under, the laws in force in the Territory of Papua or the Territory of New Guinea, other than Acts of the Parliament, or Imperial Acts, as extending to either or both of those Territories of their own force.

Appendix 2: Death Penalty Abolition Amendment Bill 2008

119. The provisions of this Bill are explained in detail in the Background Paper. See "Death Penalty Abolition Amendment Bill 2008" on page 18.

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5 Repeal and Substitute Section 3 ('Application of this Act')	3
6 Insert Sections 3A ('Object and Operation of this Act') and 3B ('Interpretation of this Act')	4
7 Schedule the Second Optional Protocol	6

1 **A Bill to amend an Act to implement Australia’s**
2 **international obligations under the *Second Optional***
3 ***Protocol to the International Covenant on Civil and***
4 ***Political Rights***

5 The Parliament of Australia enacts:

6 ***1 Short title***

7 This Act may be cited as the *Death Penalty Abolition Amendment*
8 *Act 2008*.

9 ***2 Commencement***

10 This Act commences on the day on which it receives the Royal
11 Assent.

12 ***3 Schedule(s)***

13 Each Act that is specified in a Schedule to this Act is amended or
14 repealed as set out in the applicable items in the Schedule.

1 **Schedule 1—Amendments**2 ***Death Penalty Abolition Act 1973***3 ***4 Insert a Preamble ('Preamble')***

4 Insert before section 1:

5 **Preamble**

- 6 (1) Believing that abolition of the death penalty contributes to
7 enhancement of human dignity and progressive development of
8 human rights,
- 9 (2) Recalling Article 3 of the *Universal Declaration of Human Rights*,
10 adopted on 10 December 1948, and Article 6 of the *International*
11 *Covenant on Civil and Political Rights*, adopted on 16 December
12 1966,
- 13 (3) Noting that Article 6 of the *International Covenant on Civil and*
14 *Political Rights* refers to abolition of the death penalty in terms that
15 strongly suggest that abolition is desirable,
- 16 (4) Convinced that all measures of abolition of the death penalty should
17 be considered as progress in the enjoyment of the right to life,
- 18 (5) Noting that the death penalty has been abolished in all Australian
19 jurisdictions since 1985,
- 20 (6) Noting that Australia, desirous to undertake an international
21 commitment to abolish the death penalty, has acceded to the *Second*
22 *Optional Protocol to the International Covenant on Civil and*
23 *Political Rights aiming at the abolition of the death penalty*, which
24 entered into force for Australia and internationally on 11 July 1991,
- 25 (7) Recognising Australia's international obligations under the *Second*
26 *Optional Protocol* to ensure that in all circumstances Australia
27 exposes no one to the real risk of execution,

28 The Parliament of Australia enacts:

1 ***5 Repeal and Substitute Section 3 ('Application of***
2 ***this Act')***

3 Repeal section 3 and substitute:

4 **3 Application of this Act**

5 (1) This Act applies within and outside Australia and binds the Crown
6 in right of the Commonwealth, of each of the States and of every
7 external Territory.

8 (2) This Act applies in relation to, and in relation to offences under,
9 the laws of the Commonwealth, of each of the States and of every
10 external Territory, and, to the extent to which the powers of the
11 Parliament permit, in relation to, and in relation to offences under,
12 Imperial Acts.

13 (3) This Act applies in relation to offences committed before, on or
14 after the date of commencement of this Act, including offences in
15 respect of which proceedings are pending at that date, and if, on
16 that date, a person is under sentence of death for an offence in
17 relation to which this Act applies, the sentence has effect as if it
18 were a sentence of imprisonment for life.

19 (4) In this section:

20 *States* includes the Australian Capital Territory and the Northern
21 Territory.

1 **6 Insert Sections 3A ('Object and Operation of this**
2 **Act') and 3B ('Interpretation of this Act')**

3 After section 3, insert:

4 **3A Object and Operation of this Act**

5 (1) The object of this Act is to give effect to the *Second Optional*
6 *Protocol to the International Covenant on Civil and Political*
7 *Rights*.

8 (2) The operation of this Act is based on the legislative power the
9 Commonwealth Parliament has under paragraph 51(xxix) of the
10 Constitution.

11 (3) In this section:

12 ***Second Optional Protocol to the International Covenant on Civil***
13 ***and Political Rights*** refers to the *Second Optional Protocol to the*
14 *International Covenant on Civil and Political Rights aiming at the*
15 *abolition of the death penalty*, that was adopted by resolution
16 44/128 of 15 December 1989 at the Forty-fourth session of the
17 General Assembly of the United Nations and that entered into force
18 on 11 July 1991, being the Optional Protocol a copy of the English
19 text of which is set out in the Schedule to this Act.

20 Note: Australia acceded to the *Second Optional Protocol to the*
21 *International Covenant on Civil and Political Rights* on 2 October
22 1990.

1 **3B Interpretation of this Act**

2 (1) When interpreting this Act, Australian courts and tribunals may
3 consider international law and the judgments of relevant domestic,
4 foreign and international courts.

5 (2) When considering foreign judgments, Australian courts and
6 tribunals must prefer the judgments of jurisdictions that have
7 abolished the death penalty over the judgments of jurisdictions that
8 retain the death penalty.

9 (3) In this section:

10 ***Relevant domestic, foreign and international courts*** means courts
11 and tribunals with competence to adjudicate on human rights and
12 humanitarian law, including the International Court of Justice and
13 the United Nations Human Rights Committee.

1 **7 Schedule the Second Optional Protocol**

2 After section 5, insert:

3 **Schedule—Second Optional Protocol to the**
4 **International Covenant on Civil and Political**
5 **Rights**

6 Section 3A(3)

7 *The States Parties to the present Protocol,*

8 *Believing* that abolition of the death penalty contributes to enhancement
9 of human dignity and progressive development of human rights,

10 *Recalling* article 3 of the *Universal Declaration of Human Rights*,
11 adopted on 10 December 1948, and article 6 of the *International*
12 *Covenant on Civil and Political Rights*, adopted on 16 December 1966,

13 *Noting* that article 6 of the *International Covenant on Civil and Political*
14 *Rights* refers to abolition of the death penalty in terms that strongly
15 suggest that abolition is desirable,

16 *Convinced* that all measures of abolition of the death penalty should be
17 considered as progress in the enjoyment of the right to life,

18 *Desirous* to undertake hereby an international commitment to abolish the
19 death penalty,

20 Have agreed as follows:

1 **Article 1**

2 1. No one within the jurisdiction of a State Party to the present
3 Protocol shall be executed.

4 2. Each State Party shall take all necessary measures to abolish the
5 death penalty within its jurisdiction.

6 **Article 2**

7 1. No reservation is admissible to the present Protocol, except for a
8 reservation made at the time of ratification or accession that
9 provides for the application of the death penalty in time of war
10 pursuant to a conviction for a most serious crime of a military
11 nature committed during wartime.

12 2. The State Party making such a reservation shall at the time of
13 ratification or accession communicate to the Secretary-General of
14 the United Nations the relevant provisions of its national legislation
15 applicable during wartime.

16 3. The State Party having made such a reservation shall notify the
17 Secretary-General of the United Nations of any beginning or
18 ending of a state of war applicable to its territory.

19 **Article 3**

20 The States Parties to the present Protocol shall include in the
21 reports they submit to the Human Rights Committee, in accordance
22 with article 40 of the Covenant, information on the measures that
23 they have adopted to give effect to the present Protocol.

24 **Article 4**

25 With respect to the States Parties to the Covenant that have made a
26 declaration under article 41, the competence of the Human Rights
27 Committee to receive and consider communications when a State
28 Party claims that another State Party is not fulfilling its obligations
29 shall extend to the provisions of the present Protocol, unless the
30 State Party concerned has made a statement to the contrary at the
31 moment of ratification or accession.

Article 5

1
2 With respect to the States Parties to the first *Optional Protocol to*
3 *the International Covenant on Civil and Political Rights* adopted
4 on 16 December 1966, the competence of the Human Rights
5 Committee to receive and consider communications from
6 individuals subject to its jurisdiction shall extend to the provisions
7 of the present Protocol, unless the State Party concerned has made
8 a statement to the contrary at the moment of ratification or
9 accession.

Article 6

10
11 1. The provisions of the present Protocol shall apply as additional
12 provisions to the Covenant.
13 2. Without prejudice to the possibility of a reservation under article
14 2 of the present Protocol, the right guaranteed in article 1,
15 paragraph 1, of the present Protocol shall not be subject to any
16 derogation under article 4 of the Covenant.

Article 7

17
18 1. The present Protocol is open for signature by any State that has
19 signed the Covenant.
20 2. The present Protocol is subject to ratification by any State that
21 has ratified the Covenant or acceded to it. Instruments of
22 ratification shall be deposited with the Secretary-General of the
23 United Nations.
24 3. The present Protocol shall be open to accession by any State that
25 has ratified the Covenant or acceded to it.
26 4. Accession shall be effected by the deposit of an instrument of
27 accession with the Secretary-General of the United Nations.
28 5. The Secretary-General of the United Nations shall inform all
29 States that have signed the present Protocol or acceded to it of the
30 deposit of each instrument of ratification or accession.

1 **Article 8**

2 1. The present Protocol shall enter into force three months after the
3 date of the deposit with the Secretary-General of the United
4 Nations of the tenth instrument of ratification or accession.

5 2. For each State ratifying the present Protocol or acceding to it
6 after the deposit of the tenth instrument of ratification or accession,
7 the present Protocol shall enter into force three months after the
8 date of the deposit of its own instrument of ratification or
9 accession.

10 **Article 9**

11 The provisions of the present Protocol shall extend to all parts of
12 federal States without any limitations or exceptions.

13 **Article 10**

14 The Secretary-General of the United Nations shall inform all States
15 referred to in article 48, paragraph 1, of the Covenant of the
16 following particulars:

17 (a) Reservations, communications and notifications under article 2
18 of the present Protocol;

19 (b) Statements made under articles 4 or 5 of the present Protocol;

20 (c) Signatures, ratifications and accessions under article 7 of the
21 present Protocol;

22 (d) The date of the entry into force of the present Protocol under
23 article 8 thereof.

24 **Article 11**

25 1. The present Protocol, of which the Arabic, Chinese, English,
26 French, Russian and Spanish texts are equally authentic, shall be
27 deposited in the archives of the United Nations.

28 2. The Secretary-General of the United Nations shall transmit
29 certified copies of the present Protocol to all States referred to in
30 article 48 of the Covenant.
31

Appendix 3: Death Penalty Abolition Amendment (Request) Bill 2008

120. The provisions of this draft model State Bill are explained in detail in the Background Paper. See "Death Penalty Abolition Amendment (Request) Bill 2008" on page 22 above.

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Death Penalty Abolition Amendment (Request) Bill 2008

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Death Penalty Abolition Amendment (Request) Bill 2008

No. _____, 2008

A Bill for

An Act to request the Parliament of the Commonwealth to amend the *Death Penalty Abolition Act 1973* (Cth) so that it applies to laws in relation to which the powers of the Parliament of New South Wales extend.

1 **The legislature of New South Wales enacts:**

2

3

4 **1 Short Title**

5

6 This Act may be cited as the *Death Penalty Abolition Amendment*
7 *(Request) Act 2008.*

8

9 **2 Commencement**

10

11 This Act commences on the day on which it receives royal assent.

12

13 **3 Request for Commonwealth Legislation**

14

15 The Parliament of the State of New South Wales requests the
16 enactment by the Parliament of the Commonwealth of an Act in, or
17 substantially in, the terms set out in the First Schedule.

Schedule 1

...attach here a copy of the federal Death Penalty Abolition Amendment Bill 2008...