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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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*.³

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### International Bill of Human Rights

- *Universal Declaration of Human Rights* (1948)
- *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)

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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

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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

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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%).


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. 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. 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. 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, to providing a process of commutation and prohibits the execution of pregnant women and juveniles below 18 years of age. 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.

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.
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. 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. 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. 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. 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. After receiving the required ten ratifications, the Protocol entered into force in international law on 11 July 1991.

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### 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:

<table>
<thead>
<tr>
<th>Participant</th>
<th>Signature</th>
<th>Ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td></td>
<td>17 Oct 2007</td>
</tr>
<tr>
<td>Andorra</td>
<td>5 Aug 2002</td>
<td>22 Sep 2006</td>
</tr>
<tr>
<td>Argentina</td>
<td>20 Dec 2006</td>
<td></td>
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<tr>
<td><strong>Australia</strong></td>
<td><strong>2 Oct 1990</strong></td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>8 Apr 1991</td>
<td>2 Mar 1993</td>
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<tr>
<td>Azerbaijan</td>
<td>22 Jan 1999</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>12 Jul 1990</td>
<td>8 Dec 1998</td>
</tr>
<tr>
<td>Bosnia &amp; Herzegovina</td>
<td>7 Sep 2000</td>
<td>16 Mar 2001</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>11 Mar 1999</td>
<td>10 Aug 1999</td>
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<tr>
<td>Canada</td>
<td></td>
<td>25 Nov 2005</td>
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<td>Cape Verde</td>
<td>19 May 2000</td>
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<td>Chile</td>
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<td>Colombia</td>
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<td>5 Jun 1998</td>
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<td>Ecuador</td>
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<td>Finland</td>
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<td>4 Apr 1991</td>
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<td>France</td>
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<td></td>
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<td>Georgia</td>
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<td>Greece</td>
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<td>Guinea-Bissau</td>
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<td>Honduras</td>
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<td>Hungary</td>
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<td>Liberia</td>
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<td>Luxembourg</td>
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<td>12 Feb 1992</td>
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<tr>
<td>Malta</td>
<td></td>
<td>29 Dec 1994</td>
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</tbody>
</table>

**source data:** UN High Commissioner for Human Rights

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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 International)\(^{26}\)

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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).

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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.


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.

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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.  

32. The Committee departed from its earlier decision in *ARJ* and reinterpreted paragraphs 6(1) and 6(2) of the ICCPR:  

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.

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.

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3.2 Once abolished, always abolished

36. The Second Optional Protocol implicitly prohibits the reintroduction of the death penalty. Before a ratifying nation 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. 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:

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**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.

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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.
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. 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. 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. The Special Rapporteur considered it unnecessary to include a provision in the Protocol to explicitly prohibit the reintroduction of capital punishment.

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 Committee and comments from academic writers 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.

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41 See also Schabas, n 13, 181 (discussion of travaux of the Protocol).
42 Bossuyt, n 21, [162].
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.  

4.1 the case for adopting the Protocol

44. When a treaty is ratified it does not automatically become Australian law. To become legally binding in Australia, legislation must be passed incorporating the treaty, in part or whole, into Australian law. Federal Parliament can choose to make that enabling legislation binding on the federal government, on the territories and even on the States. While such legislation can be passed without the approval of all the States, 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. In 1990, the Australian foreign minister expressed the opinion that the Protocol simply reflected the local situation in Australia. There appeared to be no need to enact legislation to adopt the Protocol into Australian law.

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46 see “Article 9: federal jurisdictions” on page 29.
47 Kioa v West (1985) 159 CLR 550, 570 (Gibbs CJ).
49 using the ‘territories power’: Constitution s 122.
51 e.g. Human Rights (Sexual Conduct) Act 1994 (Cth) was used to override those sections of Tasmania’s Criminal Code that criminalised homosexuality.
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, Western Australia and New South Wales. In 2003, the Australian Prime Minister John Howard encouraged the States to debate reintroduction of the death penalty. The rise of the One Nation party has added fuel to this debate. 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’.

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. 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, however the Kable principle has been continuously narrowed to the point of non-existence.

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.

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.
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 (Qld) [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. 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. 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 paper and is explained in more detail below.

4.2 Death Penalty Abolition Act 1973

53. The Death Penalty Abolition Act 1973 (Cth) 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. The Act also binds the territories.

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, the Court upheld federal legislation that overrode State laws criminalising homosexuality in Tasmania. 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 law and the constitutional provision that federal laws trump State laws.

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64 see Zines, n 48, 210-2.
65 see “Appendix 2: Death Penalty Abolition Amendment Bill 2008” on page 32.
68 Death Penalty Abolition Act 1973 (Cth) s 3(1).
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 2008\(^{73}\) 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(xxxix) 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, 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.

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. 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.\(^\text{79}\)

\(^{79}\) 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. 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).

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 of 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.

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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.  
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].
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)/84ab9690ccd81fc7c12563ed0046fae370OpenDocument>.
88 Bossuyt, n 21, [156].
92. The first paragraph of this article is the ‘essential object’ of the Protocol.\textsuperscript{89} It confers an individual right.\textsuperscript{90} The paragraph is also self-executing (in those nations that do not require enabling legislation for ratified treaties to take domestic legal effect).\textsuperscript{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 \textit{itself}. The Protocol is silent on the law of extradition.\textsuperscript{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.\textsuperscript{93}

5.4 Article 2: wartime exception

\textbf{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.

95. This article permits a State Party to reserve the right to apply the death penalty in wartime for very serious crimes.\textsuperscript{94} This is the only exception to the rule of total abolition under the Protocol.\textsuperscript{95} The exception does not override a nation’s obligations under international humanitarian law, therefore the \textit{Geneva Conventions} continue to apply with full force.\textsuperscript{96}

\textsuperscript{89} Bossuyt, n 21, [160].
\textsuperscript{90} Bossuyt, n 21, [159].
\textsuperscript{91} Bossuyt, n 21, [158]-[159].
\textsuperscript{92} for more information on capital punishment and extradition: see NSW Council for Civil Liberties, \textit{The Death Penalty in Australia and Overseas} (March 2005) BP 2005/3.
\textsuperscript{93} see “Obligation not to expose anyone to execution” on page 10.
\textsuperscript{94} Bossuyt, n 21, [163].
\textsuperscript{95} Bossuyt, n 21, [166].
\textsuperscript{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*, 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.

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. Spain, Malta and Cyprus also entered reservations, but have since withdrawn them.

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’.

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.

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.

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.

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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. 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. Thirty (30) of those 48 nations, Australia among them, 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.

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105 UNHCHR, n 25.

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.
\(^{109}\) 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.\(^\text{112}\) It ensures that federal governments are held responsible for the human rights violations of their constituent States.\(^\text{113}\) Because Australia is a federation of states, this is a highly significant clause.

115. Such clauses have been controversial in the past.\(^\text{114}\) Australia originally filed a reservation limiting the effect of the equivalent clause in the International Covenant on Civil and Political Rights.\(^\text{115}\) That reservation was withdrawn on 6 November 1984 and replaced with a ‘federal declaration’:\(^\text{116}\)

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.’).


\(^{116}\) 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.\textsuperscript{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.

\textsuperscript{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.
2008

The Parliament of the Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Death Penalty Abolition Amendment Bill 2008
No. , 2008

( )

A Bill to amend an Act to implement Australia’s international obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights
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6 Insert Sections 3A (‘Object and Operation of this Act’) and 3B (‘Interpretation of
    this Act’)..................................................................................................................... 4
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A Bill to amend an Act to implement Australia’s international obligations under the Second Optional Protocol to the International Covenant on Civil and Political Rights

The Parliament of Australia enacts:

1 **Short title**

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

2 **Commencement**

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

3 **Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or 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 
enhancement of human dignity and progressive development of 
human rights,

7 (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,

8 (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,

9 (4) Convinced that all measures of abolition of the death penalty should 
be considered as progress in the enjoyment of the right to life,

10 (5) Noting that the death penalty has been abolished in all Australian 
jurisdictions since 1985,

11 (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,

12 (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,

13 The Parliament of Australia enacts:

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*Death Penalty Abolition Amendment Bill 2008*
5 Repeal and Substitute Section 3 (‘Application of this 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.
6 Insert Sections 3A (‘Object and Operation of this Act’) and 3B (‘Interpretation of this Act’)

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.
7 Schedule the Second Optional Protocol

After section 5, insert:

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

Section 3A(3)

The States Parties to the present Protocol,

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

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,

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,

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

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

Have agreed as follows:
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.

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.

Article 3
The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4
With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.
Article 5

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

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.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.

2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.
Article 8
1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9
The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10
The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:
(a) Reservations, communications and notifications under article 2 of the present Protocol;
(b) Statements made under articles 4 or 5 of the present Protocol;
(c) Signatures, ratifications and accessions under article 7 of the present Protocol;
(d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11
1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.
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.
## Death Penalty Abolition Amendment (Request) Bill 2008

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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.
The legislature of New South Wales enacts:

1 Short Title

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

2 Commencement

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

3 Request for Commonwealth Legislation

The Parliament of the State of New South Wales requests the enactment by the Parliament of the Commonwealth of an Act in, or 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...