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The Right to Life, the Death Penalty and Human Rights Law: An International and Australian Perspective

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Abstract

Despite the formal or de facto abolition of capital punishment in many countries, its continued use in a significant number of nations, particularly in our own region, continues to be controversial on moral, political, legal and pragmatic grounds. It also gives rise to challenges for Australia's engagement and collaboration in law enforcement activities with our near neighbours.

Part 1 of this article provides an overview of the extent of capital punishment in today's world, identifying those countries that retain the death penalty and discussing the number of death sentences imposed and carried out in those countries. Part 2 briefly reviews the principal arguments for and against capital punishment. Part 3 summarises the international law on capital punishment, describing the trend toward its abolition and the significant restrictions under international law on its imposition, even when it is still permissible for a state to impose it. Part 4 briefly discusses the death penalty in Australian law and Australia's international obligations in relation to the death penalty. Part 5 considers some of the complications that arise for Australian authorities in criminal law enforcement cooperation with countries which retain the death penalty. Part 6 examines the approach of the current Australian Government to the death penalty abroad, and the apparent inconsistencies that have emerged in recent years.

The right to life, the death penalty and human rights law: an international and Australian perspective

Andrew Byrnes

Despite the formal or de facto abolition of capital punishment in many countries, its continued use in a significant number of nations, particularly in our own region, continues to be controversial on moral, political, legal and pragmatic grounds. It also gives rise to challenges for Australia's engagement and collaboration in law enforcement activities with our near neighbours. Calls to consider the reintroduction of capital punishment here and abroad in the context of the so-called 'war on terror' provide the opportunity to review existing international and Australian law on the death penalty, to examine once again the underlying ethical and policy reasons for its disappearance from the Australian criminal justice system, and to evaluate the steps that are necessary to add momentum to the worldwide trend towards its abolition.

Part 1 of this chapter provides an overview of the extent of capital punishment in today's world, identifying those countries that retain the death penalty and discussing the number of death sentences imposed and carried out in those countries. Part 2 briefly reviews the principal arguments for and against capital punishment. Part 3 summarises the international law on capital punishment, describing the trend toward its abolition and the significant restrictions under international law on its imposition, even when it is still permissible for a state to impose it. Part 4 briefly discusses the death penalty in Australian law and Australia's international obligations in relation to the death penalty. Part 5 considers some of the complications that arise for Australian authorities in criminal law enforcement cooperation with countries which retain the death penalty. Part 6 examines the approach of the current Australian Government to the death penalty abroad, and the apparent inconsistencies that have emerged in recent years.

1. The death penalty in today's world

Under present international law there is no absolute prohibition on the imposition of the death penalty binding on all countries in the world. 1 Many states have accepted binding treaty obligations not to impose the



death penalty in any circumstances (or just in peace time) and others have voluntarily undertaken not to impose capital punishment or to carry out death sentences. However, there is still a significant minority of states that retain the death penalty and affirm its legitimacy, legality and efficacy. Yet even for those states that retain capital punishment and impose death sentences, there are international law constraints on the crimes for which capital punishment may be imposed, the persons on whom it may be imposed and the procedures that must be followed if a death sentence is to be permitted under international law. In many cases in which the death penalty is imposed today, those binding legal strictures are not properly observed.

Over the last 60 years there has been an increasing trend worldwide towards restricting the use of the death penalty.² This can be seen in the growing number of states that have become de iure or de facto abolitionist, and the decreasing number of crimes for which the death penalty may be imposed in those countries that retain capital punishment.³ Table 1 shows the clear trend towards restriction and abolition (de iure and de facto) of the death penalty.

	Completely abolitionist	Abolitionist for ordinary crimes	Retentionist – de facto abolitionist	Retentionist
1 January 1999 (194 countries)	70	11	34	79
31 December 2003 (195 countries)	80	12	41	62

Table 1: International trends towards abolition of the death penalty Source: United Nations⁴

More recent figures provided by Amnesty International indicate that the trend continues.⁵ Fifty countries have abolished the death penalty for all crimes since 1990 and only four countries have reintroduced it (two of which have since abolished the death penalty once more).⁶

There are no authoritative statistics on the number of death sentences imposed worldwide, the number of persons sentenced to death whose sentences have not been carried out, or on the exact number of executions

carried out each year. This is because some countries do not publish official or reliable statistics. The figures generally relied on are those compiled by bodies such as Amnesty International, which are a combination of official figures, reports from non-governmental organisations, media reports and other sources. According to Amnesty International:⁷

During 2006, at least 1,591 people were executed in 25 countries and at least 3,861 people were sentenced to death in 55 countries. These were only minimum figures; the true figures were certainly higher.

In 2006, 91 per cent of all known executions took place in China, Iran, Pakistan, Iraq, Sudan and the USA.

Based on public reports available, Amnesty International estimated that at least 1,010 people were executed in China during the year, although the true figures were believed to be much higher. Credible sources suggest that between 7,500 to 8,000 people were executed in 2006. The official statistics remain a state secret, making monitoring and analysis problematic.

Iran executed 177 people, Pakistan 82 and Iraq and Sudan each at least 65. There were 53 executions in 12 states in the USA.

The worldwide figure for those currently condemned to death and awaiting execution is difficult to assess. The estimated number at the end of 2006 was between 19,185 and 24,646 based on information from human rights groups, media reports and the limited official figures available.

Those jurisdictions that retain the death penalty frequently do so in relation to serious crimes against the person, such as homicide or rape. However, the list of offences for which the death penalty may be (and is) imposed in some countries is considerably longer. In his 2007 report to the UN Human Rights Council, the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, listed offences for which death sentences had been imposed by various countries in recent years. These offences included:⁸

Adultery, apostasy, blasphemy, bribery, acts incompatible with chastity, corruption, drug possession, drug trafficking, drug-related offences, economic offences, expressing oneself, holding an opinion, homosexual acts, matters of sexual orientation, manifesting one's religion or beliefs, prostitution, organisation of prostitution,



participation in protests, premarital sex, singing songs inciting men to go to war, sodomy, speculation, acts of treason, espionage or other vaguely defined acts usually described as "crimes against the State", and writing slogans against a country's leader.

In some retentionist states, the death penalty is prescribed as a mandatory penalty for certain categories of offence. Singapore, for example, imposes a mandatory death sentence for drug trafficking. In others, the death penalty is discretionary and may be imposed only after an individualised assessment of the circumstances of the crime and of the offender. In most retentionist countries there is a right to apply for clemency, but some states make a practice of refusing to grant clemency in certain death penalty cases.

In most retentionist countries, the death penalty may not be imposed on children or on pregnant women. However, there are a number of countries in which death sentences have been imposed and carried out on persons who were minors at the time they committed the crime. Amnesty International claims that since 1990 some nine countries are known to have executed persons who were under 18 at the time of the crime.

The methods of execution of offenders vary considerably around the world. They include beheading, electrocution, hanging, lethal injection, shooting and stoning.¹⁰

2. The arguments for and against the death penalty

A major reason for the retreat from the use of capital punishment is that citizens and the politicians who represent them no longer accept the arguments advanced to justify it, and find the arguments against capital punishment far more compelling.

The justifications advanced for the death penalty are principally two: a retributive argument and the deterrence argument. A retributive justification for capital punishment for homicide has its roots in the approach of 'an eye for an eye, a tooth for a tooth'. The notion is that the community in this way expresses its condemnation of a heinous crime and exacts moral satisfaction from the offender. The objections to this approach include the position that the deliberate taking of life by the state undermines the sanctity of life, has a brutalising effect on society, and sees the offender as beyond rehabilitation.



In one of his judgments, ¹¹ the eminent South African judge, Justice Ismail Mahomed, ¹² eloquently stated this viewpoint:

[265] The death penalty sanctions the deliberate annihilation of life. As I have previously said, it is the ultimate and the most incomparably extreme form of punishment ... It is the last, the most devastating and the most irreversible recourse of the criminal law, involving as it necessarily does, the planned and calculated termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all humankind.

[270] The deliberate annihilation of the life of a person, systematically planned by the state, as a mode of punishment, is wholly and qualitatively different ... It is systematically planned long after — sometimes years after — the offender has committed the offence for which he is to be punished, and whilst he waits impotently in custody, for his date with the hangman. In its obvious and awesome finality, it makes every other right ... permanently impossible to enjoy. Its inherently irreversible consequence makes any reparation or correction impossible, if subsequent events establish, as they have sometimes done, the innocence of the executed or circumstances which demonstrate manifestly that he did not deserve the sentence of death.

[271] The death sentence must, in some measure, manifest a philosophy of indefensible despair in its execution, accepting as it must do, that the offender it seeks to punish is so beyond the pale of humanity as to permit no rehabilitation, no reform, no repentance, no inherent spectre of hope or spirituality; nor the slightest possibility that he might one day, successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms protected in Chapter 3 of the Constitution, the exercise of which is possible only if the 'right to life' is not destroyed. The finality of the death penalty allows for none of these redeeming possibilities. It annihilates the potential for their emergence ...

[272] It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place ...

The argument based on deterrence continues to be invoked by politicians defending or calling for capital punishment. It frequently has an intuitive appeal for societies whose members feel the need for strong action to be taken to respond to or deter serious crime. Here the critical question is not whether the death penalty has some deterrent effect, but whether it has a *unique* deterrent effect, compared with other sanctions such as imprisonment for life or a term of years.

Given that what is at stake is the legitimacy of the state's claim to kill someone, even if one accepts that deterrence would be a legitimate justification for the state to extinguish a person's life, it is not unreasonable to ask that the state clearly demonstrate that the deterrent effect claimed does in fact exist. However, despite dozens of criminological studies over the last 40 years, there is no persuasive evidence that the death penalty has a unique deterrent effect.¹³

Most of the studies have been carried out in the United States and Western societies and have examined the existence of a deterrent effect in relation to homicide offences. However, it does not appear that any of the jurisdictions in our region (or elsewhere) that continue to justify the death penalty on this basis have undertaken similarly detailed research. To persist in the deterrence argument in such circumstances reflects not only poor policy-making but also ignorance or wilful disregard of the lack of evidence.

Other arguments against the death penalty are based on ethical, moral, pragmatic and religious grounds. ¹⁴ Some of them appear in the passage from Justice Mahomed's judgment above. Of particular concern is the fallibility of human institutions, including the criminal justice systems. Mistakes are made, and in a significant number of murder cases in different countries, defendants convicted of murder have subsequently been shown to be innocent of the crime. In those jurisdictions where the death penalty has been imposed and carried out, there is nothing that can be done to reverse the deliberate killing of an innocent person. ¹⁵

Another concern about the imposition of the death penalty is that in practice it has a disparate impact on particular social groups, in particular those from racial or ethnic minorities, as well as those who suffer from other disadvantages such as socio-economic deprivation and mental illness. Its impact, then, tends to fall unequally – and thus arbitrarily – on less well-off groups in society.



3. International law and the death penalty

The imposition of the death penalty may involve the violation of a number of internationally guaranteed human rights. These include the right not to be arbitrarily deprived of one's life, and a range of specific procedural and other rights that must be observed in any case in which the death penalty is imposed. The imposition of the death penalty may also violate other rights, such as the right not to be subjected to cruel, inhuman or degrading treatment or punishment, fair trial rights, the right to equality and non-discrimination and the freedom of opinion or expression. This section focuses on the right to life and the specific requirements relating to the death penalty.

The right to life and the death penalty under international law

The right to life is guaranteed under a number of international human rights instruments, as well as under the constitutions of most countries of the world. It is generally accepted as being part of customary international law. International law guarantees everyone the right to life, or more exactly the right not to be arbitrarily deprived of one's life. For example, Article 3 of the Universal Declaration of Human Rights 17 states that 'Everyone has the right to life', while Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) 18 provides:

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.

The right to life is not an absolute right – a person is entitled to have his or her right to life protected by law and must not be arbitrarily deprived of life. ¹⁹ This means that there are certain circumstances in which a person may be lawfully and non-arbitrarily deprived of his or her life. ²⁰

It is generally accepted that customary international law has not yet prohibited the death penalty, although there are many restrictions on when and how it may be imposed. The general position under international law is set out in the Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the United Nations Economic and Social Council (ECOSOC)²¹ and referred to on many occasions in resolutions of the UN General Assembly, the former UN Human Rights Commission²² and other international bodies. The principal UN treaty is the ICCPR (supplemented by its Second Optional Protocol). The standards set out in the Safeguards essentially reflect the guarantees of the ICCPR. Accordingly, all states are bound by broadly the same standards in relation to the death penalty, whether or not they are parties to the ICCPR.²³



What are the 'most serious crimes'?

While it is generally accepted that homicide may fall within the category of the 'most serious crimes' for which the death penalty may be imposed, there is dispute over whether offences that do not involve the loss of human life – such as drug trafficking offences, economic and financial crimes or corruption offences – fall within that category.²⁴

In a recent examination of the issue, Philip Alston summarised his analysis of the practice of the Human Rights Committee and other UN bodies on this issue in the following terms:²⁵

53. The conclusion to be drawn from a thorough and systematic review of the jurisprudence of all of the principal United Nations bodies charged with interpreting these provisions is that the death penalty can only be imposed in such a way that it complies with the stricture that it must be limited to the most serious crimes, in cases where it can be shown that there was an intention to kill which resulted in the loss of life.

Mandatory death sentences

Under international law, it is clear that a mandatory death sentence is a violation of the right to life. This has been confirmed by the Human Rights Committee in many cases under the First Optional Protocol to the ICCPR, as well as in its other practice. This position has also been adopted by a number of leading courts in countries where the death penalty is imposed (for example, the Supreme Court of India and the Privy Council on appeal from various Caribbean countries), although there are a number of courts (for example, the Singapore Court of Appeal)²⁶ that continue to adhere to the position that a mandatory death sentence may be consistent with national and international guarantees of the right to life, notwithstanding the overwhelming weight of international judicial and other opinion to the contrary.

Other rights of defendants

A number of other important guarantees must be observed in any proceedings that lead to the imposition of the death penalty. In particular, the defendant must be provided with a fair trial before an independent and impartial tribunal and guaranteed the various rights set out in articles 14 and 15 of the ICCPR. In particular, legal representation must always be provided to the accused in death penalty cases.²⁷



Is the death penalty an arbitrary deprivation of life?

Even though customary international law and the ICCPR recognise the possibility that the death penalty may be lawfully imposed, and regulate the circumstances under which that may occur, it is arguable that the general prohibition on the *arbitrary* deprivation of life renders the imposition of the death penalty unlawful in all circumstances, because it can never be anything but arbitrary.

This argument focuses on the justifications commonly advanced for the death penalty and the manner in which it is in fact imposed. If the major rationale for the death penalty – deterrence – is a flawed one, as it plainly is, ²⁸ then relying on that to justify a deliberate deprivation of life would be unreasonable and perverse. Equally, where a death sentence is mandatory for particular crimes, then the failure to permit a court to take into account the particular circumstances of the crime and the offender will mean that individuals in quite different circumstances and with different levels of guilt may receive the same sentence – arguably arbitrary as well. Even where an individualised assessment is attempted, that may result in quite disparate sentences for persons in a similar position.

This happened with six of the 'Bali nine' who were sentenced by two different benches of the same court in Indonesia. Of three 'mules' who appeared to be equally guilty, Scott Rush had his sentence increased from life to death without reference to the sentences imposed on the other 'mules', while in the appeal of Martin Stephens and Michael Czugaj against their 20-year sentences, a different panel of the court increased their sentences to life after undertaking a comparative analysis of the various cases.²⁹

The death penalty as cruel, inhuman or degrading treatment

Under international law generally and the ICCPR in particular, the death penalty does not of itself amount to cruel, inhuman or degrading treatment. Under certain circumstances, this guarantee may nonetheless be violated. For example, the Human Rights Committee has held that particular forms of execution may violate the guarantee, and in certain circumstances a prolonged stay on death row awaiting execution may constitute a breach of this guarantee.

A number of national courts have come to the conclusion that the imposition of the death penalty under any circumstances amounts to cruel, inhuman and degrading treatment or punishment in violation of



their national constitutions, thus going beyond the existing state of international law, which still seems to accept that the death penalty per se is not cruel, inhuman or degrading treatment. The most prominent case in this regard is the decision of the South African Constitutional Court in *State v Makwanyane*.³⁰

Extraterritorial effect of human rights obligations

Under the ICCPR and similar human rights treaties, it may be a violation of its treaty obligations for a state to return a person to a country where he or she faces the possibility of capital punishment contrary to the guarantees of the ICCPR. So returning a person to face an unfair trial before a special court, or to undergo execution by gas asphyxiation,³¹ or to spend an inordinate period in terrible conditions on death row, would all constitute a violation of the ICCPR (and arguably customary international law as well).

But the obligations under the Covenant extend even further. Any state party to the treaty that has abolished the death penalty in its own jurisdiction is prevented from returning a person to a jurisdiction where the person faces a real risk of the death penalty, even when the imposition of the death penalty would be otherwise consistent with the ICCPR. The Human Rights Committee, after some initial prevarication on the issue, adopted this view in a case brought against Canada in relation to extradition of a person to the US.³²

The Second Optional Protocol

Finally, mention should be made of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, adopted in 1989.³³ States that become parties to this treaty undertake to ensure (under Article 1) that:

- 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.

It is possible, however, for a state party to reserve the right to apply the death penalty 'in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime'.



4. The death penalty in Australia

In Australia, capital punishment existed from the earliest days of British settlement and at one time or other was part of the law in all Australian jurisdictions. By 1985 – nearly 200 years after the first recorded execution in Australia under British rule – the death penalty had been removed from the statute books of all jurisdictions, for all offences. The last execution in Australia took place in Victoria in 1967. Table 2 shows the dates on which the various Australian jurisdictions abolished the death penalty.

Jurisdiction	Abolished	Last execution
Queensland	1922	1913
Tasmania	1968	1946
Commonwealth	1973	
ACT	1973	
NT	1973	1952
Victoria	1975	1967
South Australia	1976	1964
Western Australia	1984	1964
New South Wales ³⁵	1955/1985	1940

Table 2: Abolition of the death penalty in Australia.³⁶

Source: NSW Council for Civil Liberties

Australia's international obligations

Australia has been a party to the ICCPR since 1980 and to the First and Second Optional Protocols to the Covenant since 1991.

One international legal consequence of Australia's abolition of the death penalty under domestic law is that it is bound not to return persons to jurisdictions where they may face the death penalty.³⁷ As a consequence of its ratification of the Second Optional Protocol, Australia is barred as a matter of international law from reintroducing the death penalty, whether at federal level or in state and territory jurisdictions.³⁸



While all Australian jurisdictions have abolished the death penalty, there is at present no barrier under *Australian* law to the reintroduction of capital punishment, although it would involve a violation by Australia of its international obligations. It has been suggested that it would be appropriate for the Federal Parliament to enact a law that gave effect to Australia's obligations under the Protocol. The external affairs power would be available to support such legislation if required, and federal legislation prohibiting the imposition of capital punishment would presumably override any state or territory law that sought to reintroduce capital punishment.³⁹ However, the federal government has not taken up these suggestions.

5. The death penalty and cooperation in international criminal law enforcement

It is necessary and desirable for Australia to cooperate closely in criminal law enforcement with countries in its immediate region, but the continuing use of the death penalty by some of those countries gives rise to difficult issues. How far should cooperation be provided where there is a possibility that it may lead to the prosecution of persons for capital offences? The issue came to a head in the case of the 'Bali nine', in which Australian Federal Police provided information to Indonesian law enforcement authorities that led to the arrest and prosecution of nine Australians in Bali for drug trafficking. Six of them were subsequently sentenced to death.

There are clear legislative limits on cooperation in a number of areas. For example, if a request for the extradition of a person is received, and the person is sought for an offence for which the death penalty may be imposed, that person may be surrendered only if Australia receives an undertaking from the requesting country that the person will not be tried for the capital offence, that the death penalty will not be imposed or that, if imposed, it will not be carried out.⁴⁰ However, there is no absolute bar on return and it is for the Attorney-General⁴¹ to decide whether the undertaking offered can be relied on.⁴²

Thus, there is no cast-iron guarantee enforceable before the Australian courts that a person will not be returned to a jurisdiction in which she or he might end up facing the death penalty, even though Australia is obliged to ensure this under the ICCPR (and arguably the Second Optional Protocol as well) and possibly also under the UN Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment.



Similarly, where there is a formal request from a foreign country for mutual criminal assistance – for example, a request to take evidence or produce documents in Australia for use in proceedings in the foreign country – there are some limitations on the provision of that assistance in cases that involve or may involve capital offences. ⁴³ Commonwealth law provides that a request for assistance must be refused if it relates to the prosecution of or punishment for a capital offence, 'unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted'. ⁴⁴

In a case in which the Attorney-General believes that the requested assistance 'may result in the death penalty being imposed on a person', he or she may refuse the request if, 'after taking into consideration the interests of international criminal cooperation, [the Attorney-General] is of the opinion that in the circumstances of the case the request should not be granted'.⁴⁵ Once again, there is no absolute bar on cooperation: the Minister has a broad discretion. The relevant international obligation is less clear. It might be held that the ICCPR and/or the Second Optional Protocol require a state that has abolished the death penalty not to lend material assistance to another state to impose it, but this is not established jurisprudence.

Further and more troublesome gaps appear in the context of agency-to-agency cooperation. Law enforcement authorities are regularly in contact with each other on the basis of formal and informal arrangements, and these may be the subject of various forms of regulation, which may include guidelines on the extent of cooperation permitted in (potential) capital cases. For instance, the Australian Federal Police (AFP) may assist foreign countries on a police-to-police basis where no charges have been laid, regardless of whether the requesting country is investigating offences that attract the death penalty. ⁴⁶

In a case brought against the AFP by Scott Rush, one of the 'Bali nine', the various documents regulating the cooperation of the AFP with overseas law enforcement authorities were described in some detail.⁴⁷ The upshot was that, although there were restrictions on the provision of assistance in capital cases once a charge had been laid, there were no formal restrictions on cooperation before a charge was laid.⁴⁸ As Colin McDonald QC notes,⁴⁹ the relevant guidelines were

... obviously drafted in an Australian common law context where an affected person is arrested and charged at the same time. The obvious intent being that the guideline applies at the earliest



occasion when coercive powers can expose a person to the death penalty, when the affected person is first exposed to penalty when arrested and 'charged'.

However, in Indonesia, where the Dutch civil system tradition has influenced the development of both civil and criminal procedure, a person is not 'charged' until the prosecutor presents the equivalent of an indictment at trial. In Indonesia a person is detained for investigation on particular Articles of the Criminal Code or relevant Drug Laws. Right from the time of arrest, Scott Rush and the other Bali Nine members were exposed to the death penalty for the main offence for which they were arrested, detained and investigated, namely, Article 82 of the '1997 Indonesian Narcotics Law'. The detention of Scott Rush under Article 82 was the situational and practical equivalent of a 'charge attracting the death penalty'.

In other words, the AFP had provided cooperation well beyond the time when it was contemplated that such assistance would be appropriate, cooperation which would not have been provided for such a period had the defendants been arrested and charged in a common law jurisdiction.

The Federal Court held in that case that the actions of the AFP in providing information and assistance to the Indonesian authorities were not unlawful under Australian law, even though they had led to the conviction of and capital sentences for a number of the 'Bali nine'.⁵⁰

This raises important issues. To what extent should Australian authorities be materially assisting investigations that are likely to lead to the imposition of death sentences, whether on Australian citizens or others? And how can a principled approach to the death penalty be reconciled with the important interests in criminal law enforcement and international cooperation?⁵¹

One commentator has proposed that the matter should be dealt with by a direction from the Minister of Justice to the Commissioner of the Australian Federal Police under subsection 37(2) of the Australian Federal Police Act, 'that AFP members are not to intentionally and predictably expose Australian citizens to the death penalty in AFP operations'. ⁵² While such a solution may appear elegantly simple, it would have considerable drawbacks if its effect were to prevent cooperation in areas of concern to Australia (for example, the identification of drug trafficking and terrorist networks).



6. A principled approach to the death penalty in foreign relations

A final dimension of the Australian government's policy on the death penalty is its approach to the imposition of the death sentence in foreign countries. The Australian government regularly makes representations on behalf of its own citizens, generally at the stage when clemency is being sought after all judicial avenues of appeal have been exhausted. The focus is on the specific circumstances of the case as much as on expressing a principled opposition to the death penalty. In addition, Australia has on various occasions over the years also expressed its general opposition to the imposition of the death penalty in particular countries, even when Australian citizens are not involved.⁵³

In recent years, however, there have been statements by senior members of the Howard Government, representing a retreat from this principled condemnation, under the rubric of respecting other states' sovereignty. Similar comments have been made by senior members of the Opposition. These comments have been made in cases in which those accused have engaged in terrorism, particularly where it has affected Australians (for example, those involved in the Bali bombings in 2002). So

A principled objection to the death penalty as an inhumane and inappropriate part of modern criminal justice systems – such as that previously expressed by Australian governments – would logically lead to opposition to the imposition of the death penalty anywhere, no matter who the accused was or what crime she or he had been convicted of. Such an approach also has practical political advantages. While it might be expected that a government would make energetic representations on behalf of its own citizens who have been sentenced to death in another country, it will hardly help to persuade the local audience when the government does not express similar concern in relation to nationals of other countries who have been sentenced to death – or indeed makes comments acquiescing in or even welcoming the imposition of the death penalty on others.

Pursuing the interests of Australian citizens in a manner that shows a consistent and principled approach to the death penalty does not necessarily involve publicly denouncing the imposition of every death sentence in a foreign country, but it certainly involves refraining from welcoming the possibility of the death penalty for those who are viewed with disfavour or contempt by the Australian Government or the



Australian community more generally, such as the Bali bombers or Al Oaeda members.

At the time of writing (October 2007), the position of the Australian Labor Party seems uncertain. When he took office as current Leader of the Opposition, Kevin Rudd appeared to be moving away from positions taken by his recent predecessors: he proposed a region-wide political strategy for the abolition of the death penalty.⁵⁷ This would seem both more principled and more likely to persuade countries that are now retentionist. However, in the events leading up to the 2007 election campaign, the Labor Party has seemed to be adopting a position closer to that of its previous leaders and of the Coalition.⁵⁸ The implications of the positions of both the Coalition and the Labor Party became more complex when in late October 2007 the Constitutional Court of Indonesia rejected appeals by three of the Australians facing death penalties. Capital punishment is likely to remain an important moral and political issue for Australians.

Note

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Notes

- 1. See generally William Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 3rd ed 2002).
- See generally Roger Hood, 'The Enigma of the "Most Serious" Offences', NYU
 Center for Human Rights and Global Justice Working Paper, Extrajudicial Executions
 Series, No 9, 2006, at 4–5, available at
 http://www.nyuhr.org/docs/WPS_NYU_CHRGJ_Hood.pdf (visited 24 March 2007).
- 3. In addition, the death penalty is excluded as a possible sentence that international criminal tribunals established by or under the auspices of the United Nations may impose, even for the most serious international crimes such as genocide and crimes against humanity.
- 4. 'Status of the death penalty at the beginning and end of the five-year survey period, 1999-2003', Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General, UN Doc E/2005/3, para 40, Table 1.
- See Amnesty International, Facts and Figures on the Death Penalty (as of 8 August 2007), available at http://web.amnesty.org/pages/deathpenalty-facts-eng (visited 19 August 2007).
- 6. Ibid.
- 7. Ibid.
- 8. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc A/HRC/4/20, para 40 (2007).
- China, Congo (Democratic Republic), Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, USA and Yemen (the last has now raised the minimum age for execution to 18): Amnesty International, Facts and Figures, note 22.
- 10. Amnesty International, Facts and Figures, note 22.
- 11. State v Makwanyane 1995 (3) SA 391, 1995 (6) BCLR 665 (Constitutional Court of South Africa), paras 265, 270–272 (citations omitted).
- 12. Justice Mahomed (1931–2000) was appointed Justice of South Africa's Constitutional Court in 1995 and Chief Justice in 1998. See http://www.concourt.gov.za/text/judges/former/justiceismailmahomed/1.html (visited 28 August 2007).
- 13. '[I]t is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment.' Roger Hood, *The Death Penalty A Worldwide Perspective* (Oxford: Clarendon Press, 3rd ed 2002), at 230. To similar effect Janet Chan and Deborah Oxley, 'The deterrent effect of capital punishment: A review of the research evidence', in NSW Bureau of Crimes Statistics and Research, Crime and Justice Bulletin, No 84, October 2004, at 11.
- 14. See, for example, American Civil Liberties Union, Death Penalty 101, available at http://www.aclu.org/capital/facts/10602res20070409.html (visited 24 August 2007), and NSW Council for Civil Liberties, *The Death Penalty in Australia and Overseas*, Background Paper 2005/3 (authored by Michael Walton), at paras 59–70 (available at http://www.nswccl.org.au/issues/death_penalty/resources.php). See also Pontifical Council for Justice and Peace, *The Compendium of the Social Doctrine of the Church* (St Pauls Publications, 2004), para 405, and more recently *Déclaration du Saint-Siège faite au Congrès mondial sur la peine de mort* (Paris, France, 1-3 février 2007),



- available at http://www.etudes-sacerdoce.org/vatican/index.php/tag/saint-siege (visited 26 August 2007).
- 15. Amnesty International claims that since 1973 in the USA 123 people have been sentenced to death who have subsequently been found innocent of the crimes for which they were sentenced to death: Amnesty International, Facts and Figures, note 22
- 16. See generally Sarah Joseph, Jenny Schultz and Melissa Castan, The International Covenant on Civil and Political Rights (Oxford University Press, 2nd ed 2004), 154–193; and Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence (Cambridge University Press, 2002) 283–295.
- 17. See http://www.un.org/Overview/rights.html (visited 28 August 2007). See http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (visited 28 August 2007). Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (Kehl, N P Engel, 2nd rev ed 2005), at 127.
- 18. See http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (visited 28 August 2007).
- 19. Nowak, note 17, at 127.
- 20. Ibid at 127-131.
- 21. The Safeguards were adopted in resolution 1984/50 of 25 May 1984.
- 22. The UN's Commission on Human Rights was abolished on 16 June 2006 and replaced by the Human Rights Council, which had been established by the General Assembly in its resolution 60/251 of 15 March 2006.
- See also UN Commission on Human Rights resolution 2005/59, paras 4(a) and (b), and 3(b).
- 24. See generally Nowak, note 17, at 141: Hood, note 2, at 3–4. The question whether drug trafficking offences are among the 'most serious crimes' was a central issue in the case brought by three of the Bali nine in Indonesia's Constitutional Court: see Byrnes, 'Drug Offences, the Death Penalty, and Indonesia's Human Rights Obligations in the case of the Bali 9: Opinion submitted to the Constitutional Court of the Republic of Indonesia', [2007] UNSW Law Research Series 44, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997178 and http://law.bepress.com/unswwps/flrps/art44/, and Colin McDonald QC, 'Don't Bury Us Before We're Dead', paper delivered at the Criminal Lawyers Association of the Northern Territory Eleventh Biennial Conference on Remote Justice, Bali, Indonesia, 5 July 2007.
- 25. Alston, note 8, para 53. See also E/2000/3, para 79 and CHR resolution 2005/59, para 7(f).
- 26. The issue was addressed by the court in Nguyen Tuong Van v Public Prosecutor [2004] SGCA 47, [2005] 1 SLR 103 (upholding the judgment of the High Court of Singapore in [2004] SGHC 54, [2004] 2 SLR 328).
- 27. Nowak, note 17, at 143.
- 28. See Roger Hood, The Death Penalty A Worldwide Perspective (Oxford: Clarendon Press, 3rd ed 2005), at 230–231 and the sources in Byrnes, note 24, at paras 123–137.
- 29. McDonald, note 24, at 30.
- 30. See note 11.
- 31. Nowak, note 17, at 139–140.



- Judge v Canada, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998, at para at 10.4 (2003).
- 33. As of 18 July 2007, there were 60 states parties to the Second Optional Protocol (including Australia).
- 34. See NSW Council for Civil Liberties, note 14, at paras 1-4.
- 35. While NSW abolished the death penalty for ordinary crimes, it retained capital punishment for treason and piracy until 1985: NSW Council for Civil Liberties, note 14, at para 3 fn 7.
- 36. The table is reproduced from NSW Council for Civil Liberties, note 14, at para 3.
- 37. Nowak, note 17, at 138, 152.
- 38. Ibid, at 136.
- 39. See NSW Council for Civil Liberties, 'Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty', Background Paper 205/4 (revised 30 May 2006), available at http://www.nswccl.org.au/docs/pdf/bp4%202005%202op%20paper.pdf.
- 40. Extradition Act 1988 (Cth), s 22(3)(c), 25(2)(b).
- 41. In practice, the Minister for Justice and Customs is the delegate of the Attorney-General in such matters.
- 42. The Full Court of the Federal Court of Australia in *McCrea v Minister for Justice and Customs* [2005] FCFCA 180, at para 25 indicated that in its view the decision-maker should 'consider whether the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the penalty of death would not be carried out'. See also *Rivera v Minister for Justice and Customs* [2007] FCAFC 123.
- 43. See Rush v Commissioner of Police [2006] FCA 12, 150 FCR 165.
- 44. Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(1A).
- 45. Mutual Assistance in Criminal Matters Act 1987, s 8(1B).
- 46. The Australian Federal Police (AFP) Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations (Attorney-General's Department, 'Fact Sheet 3, How does Mutual Assistance work in Death Penalty matters' (as of 1 February 2007), available at
 - http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Mutual assistance_Mutualassistanceindeathpenaltymatters (visited 20 August 2007).
- 47. Rush v Commissioner of Police [2006] FCA 12.
- 48. See generally McDonald, note 24. McDonald was counsel for Scott Rush in the Federal Court case and one of his legal advisers in the Indonesian proceedings.
- 49. Ibid, at 24
- 50. See John von Doussa QC, 'The Death Penalty A Matter of Principle', speech at the national conference of the United Nations Association of Australia, October 2006, available at
 - $http://www.humanrights.gov.au/about_the_commission/speeches_president/death_pen~alty.html.$
- 51. See the comments of Justice Finn about the need to revisit the existing procedures: *Rush v Commissioner of Police* [2006] FCA 12 at [1]. See also Simon Bronitt, 'Directing traffic: The death penalty and cross-border law enforcement', *ANU Reporter*, Autumn 2006,



- http://info.anu.edu.au/mac/Newsletters_and_Journals/ANU_Reporter/097PP_2006/_0 2PP_Autumn/_bronitt.asp.
- 52. McDonald, note 24, at 42-43.
- 53. For a number of examples, see Michael Walton, 'Australia Changes its Position on the Death Penalty' (2003) 6 *Human Rights Defender*, available at http://www.austlii.edu.au/au/journals/HRD/2003/6.html.
- 54. On 16 February 2003 Prime Minister John Howard said in a television interview that the Bali bombers 'should be dealt with in accordance with Indonesian law. ... and if [the death penalty] is what the law of Indonesia provides, ... There won't be any protest from Australia'. (ATV Channel 7, 'Interview with John Howard (Part 2)', Sunday Sunrise, 16 February 2003). For similar comments, see also the transcript of the interview of the Prime Minister with Neil Mitchell, Radio 3AW, 8 August 2003, following the death sentence imposed on one of the Bali bombers, Amrosi, available at http://www.smh.com.au/articles/2003/08/08/1060145858623.html. In March 2003 on US television the Prime Minister said he would welcome the death penalty for Osama bin Laden. 'I think everybody would,' Mr. Howard said. (Fox News, 'John Howard, Australian Prime Minister', Your World with Neil Cavuto, 6 March 2003). See http://www.nswccl.org.au/issues/death_penalty/aust_policy.php. In late 2006, Mr Howard was also reported as welcoming the guilty verdict in the trial of Saddam Hussein and commenting: 'what other countries do with the death penalty is other countries' business' (Cynthia Banham, 'Saddam got a fair hearing, says Howard', The Sydney Morning Herald, 7 November 2006, available at http://www.smh.com.au/news/world/saddam-got-a-fair-hearing-sayshoward/2006/11/06/1162661616180.html.)
- 55. Three leaders of the Opposition Simon Crean, Mark Latham and Kim Beazley have been reported as expressing views supporting the imposition of the death penalty overseas or refusing to object to its imposition. See 'Politicians split on Amrosi's death penalty', ABC News Online, 8 August 2003, available at http://www.abc.net.au/news/stories/2003/08/08/920128.htm; 'Howard and Latham would back death penalty', *The Sydney Morning Herald*, 15 December 2003, available at http://www.smh.com.au/articles/2003/12/15/1071336848829.htm; and Cynthia Banham, 'Saddam got a fair hearing, says Howard' (see note 54).
- 56. Ibid. Although the Australian Government went to considerable efforts to ensure that David Hicks, then suspected of terrorist acts, would not be subject to the death penalty when brought to trial before a military commission in Guantánamo Bay: Leigh Sales, *Detainee 002: The Case of David Hicks* (Melbourne University Press, 2007), 96–98. It is not clear whether the 'war on terror' is having the long-term effect of increasing support for the death penalty: NSW CCL, note 14, at paras 8–14, and von Doussa, note 50, fn 17.
- 57. See Robert Macklin, *Kevin Rudd: The Biography* (Viking, 2007), 206–207; 'Australia: Rudd would oppose death penalty', Asian Death Penalty, 24 June 2007, available at http://asiadeathpenalty.blogspot.com/2007/06/australia-rudd-would-oppose-death.html (visited 26 August 2007). See also speech by Bob McMullan MP, Member for Fraser, Forum on Australia and the Death Penalty, Centre for International and Public Law, ANU, 27 November 2006, at 4, available at http://eherald.alp.org.au/download/now/mcmullan_death_penalty.pdf (visited 24 August 2007).
- 58. See Peta Donald, 'Rudd chides frontbencher over death penalty remarks', ABC News Online, 9 October 2007, available at http://www.abc.net.au/news/stories/2007/10/09/2055023.htm.

