

NO. 61

# CONFRONTING THE DEATH PENALTY

*People, politics and principle*

**Michael Costigan, Peter Norden SJ,  
Brian Deegan, Andrew Byrnes**



ACSJ

**CATHOLIC SOCIAL JUSTICE SERIES**

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## Foreword

In 2000, the ACSJC published a paper in this series entitled *The Death Penalty: Why Catholics should oppose it* (Catholic Social Justice Series No. 40). The author was Dr Michael Costigan, who is a contributor to this collection. Since that paper is still an excellent overview of the moral and ethical issues, why are we revisiting this subject?

One reason is a change, not in those moral and ethical issues, but in social and political circumstances. Barely a year after Dr Costigan's paper appeared, the attack on the World Trade Centre in New York took place and every nation and citizen had to confront the threat of international terrorism. Only a few years later, we saw fellow-Australians suffer terribly at the hands of terrorists. The question of responding to violence with violence – including the execution of criminals – became an immediate one. In addition, a number of Australians were sentenced to death and executed for crimes in other countries. The death penalty was suddenly in the public mind again.

A notable aspect of this paper is the strong element of personal witness of the contributors. Dr Costigan, in addition to his measured analysis of the response of Catholic social teaching, has added a personal perspective to the topic. The following two essays, by Fr Peter Norden SJ and Brian Deegan, are frank and moving descriptions of grief and anger and of attempts to align those human responses with a sense of justice and mercy. Finally, Professor Andrew Byrnes gives a clear and valuable summary of some of the legal and policy aspects of the death penalty from Australian and international perspectives.

The death penalty is incompatible with our shared belief in life as a precious gift from God. This publication shows that the principles upon which we oppose capital punishment are such that no exceptions should be made at home or abroad. The fundamental human right to life is not a relative concept. All humans, not just Australians, are entitled to protection from the death penalty.

I am proud to introduce these essays as valuable contributions to the discussion of the culture of life.

A handwritten signature in black ink, reading "Christopher Saunders". The signature is written in a cursive style with a large, sweeping initial 'C'.

Christopher A. Saunders DD  
Bishop of Broome  
Chairman, Australian Catholic Social Justice Council.

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# **Catholic social teaching and the death penalty**

*Michael Costigan*

One of the characteristics of Catholic social teaching is that it evolves and develops as time passes and social situations change. Its basic principles, inspired by the Gospel and by the words and deeds of Jesus Christ, remain constant, while the application of those principles to concrete situations will depend on ever-varying circumstances – and also on prayerful reflection on the kind of response that the Scriptures and the Church’s teaching require at a given moment.

A fundamental principle of Catholic social teaching affirms that every human person has an essential and inalienable dignity deriving from the fact that we are all created in God’s image and that God intends our personal salvation and eternal happiness. That principle of human dignity applies in a special way to capital punishment – a controversial issue that has certainly been subject to the evolution and development of Church teaching.

## ***Papal teaching***

Pope Benedict XVI, in his previous capacity as Cardinal President of the Congregation for the Doctrine of the Faith, drew attention to this change in 1997, when introducing the revised Latin text of *The Catechism of the Catholic Church*. He was referring to the incorporation in the Catechism<sup>1</sup> of the position on the death penalty taken by Pope John Paul II throughout his pontificate, most formally in the 1995 encyclical letter *Evangelium Vitae*.<sup>2</sup>

Pope John Paul wrote that the nature and extent of the punishment inflicted on offenders ‘must be carefully evaluated and decided upon, and ought not to go to the extreme of executing the offender except in cases of absolute necessity – in other words, when it would not be possible otherwise to defend society’. He added: ‘Today, however, as a result of steady improvements in the organisation of the penal system, such cases are very rare, if not practically non-existent.’ According to Cardinal Ratzinger, this represented a true departure from traditional teaching, necessitating an amendment to the text of the Catechism in its second edition.

In practice, Pope John Paul II was probably the world's leading advocate for the abolition of capital punishment everywhere. While nations abolishing it earned his praise and that of other Church spokespeople, he continued until the end of his pontificate to support appeals for commuting this dire punishment in every case brought to his attention, no matter how dreadful the crime leading to the sentence of execution. His interventions (most of which failed) were always founded on the principles of human dignity, the value of life, the importance of forgiveness and the need to give guilty parties the opportunity to repent, to reform their ways and, if possible, to make some compensating contribution to the good of society.

It is not that Pope John Paul's teaching was an abrupt or unexpected reversal of what had gone before. While it was a move away from a qualified acceptance of capital punishment to its de facto rejection, the Pope's position was a logical consequence of the teaching of the Second Vatican Council and of other previous papal pronouncements underlining the importance of human rights and, in particular, the right to life.

Even when Church teaching affirmed without qualification the right of the state to perform executions, it was never asserted that the authorities were obliged to legislate in favour of this form of punishment or to carry out executions in particular cases.

### ***The Church and the death penalty in history***

Scholars have looked at the long and complex history of the Church's teaching and practice in relation to this matter. One valuable resource is the entry on capital punishment in the second edition (2002) of the New Catholic Encyclopedia.<sup>3</sup>

The article comments on the difference in approach between the Old Testament, with its emphasis on the principle of retribution, and the New Testament, where more attention is given in Christ's teaching to mercy and forgiveness. Noteworthy are his words on the famous *lex talionis* ('An eye for an eye, a tooth for a tooth', Ex. 21: 23-24): 'If someone strikes thee on the right cheek, turn to him the other also' (Mt 5:38-39).

The Encyclopedia writers point out that every execution reported in the New Testament resulted from an unjust abuse of power. These include the beheading of John the Baptist, the slaying by Herod of the innocent children, the stoning of Stephen (Acts 8:1), the killing of Antipas of

Pergamum (Revelation 2:13) and, of course, the crucifixion of Jesus himself.

The article summarises the history of the Church's approach to capital punishment by distinguishing five periods.

In the first period, until the conversion to Christianity of the Roman Emperor Constantine (312 AD), capital punishment was seen by believers as an 'unsavoury institution used as a blunt instrument of power politics'. The practice was condemned in 306 at the Council of Elvira.

With the second period, however, beginning with the conversion of the Emperor Constantine, Christians themselves became potential executioners. Even so, major Church figures such as Saints Martin of Tours, Ambrose, Augustine and John Chrysostom expressed serious reservations, notably after the execution by the Emperor Maximus of the heretical Bishop Priscillian of Avila (385 AD). It can be claimed, in fact, that an aversion to the use of the death penalty was typical of the Church's attitude until at least the 11th century.

The approach changed gradually with the advent of a more militant policy on the use of violence in defence of the Faith. This was the beginning of the age of the Crusades (the third period). In 1140, the great canonist Gratian reached the conclusion that executions could be lawfully carried out in certain circumstances. In 1215, the Fourth Lateran Council opened the way for heretics to be handed over to the secular power for punishment 'after the bishop had applied all the sanctions of canon law'. Later in the 13th century, St Thomas Aquinas (1225–74) supported the case for capital punishment, using a questionable analogy between the killing of a miscreant and the amputation of a diseased limb. Nevertheless, Aquinas held that, generally speaking, the punishment of crime should be remedial rather than retributive.

The fourth period extends from the rise of the nation-state during and after the Renaissance until modern times. With heresy and nonconformity appearing to undermine national unity, the practice of capital punishment continued unabated in most of the newly formed states. As a general rule, the Church authorities did not oppose this, at times cooperating in the practice. One sad if also glorious example was the burning in Rouen on 30 May 1431 of the young woman who was to become the Patron Saint of France, Joan of Arc.

While there has been some exaggeration in accounts of the use of the death penalty in relation to phenomena such as witchcraft and the

Spanish Inquisition (especially under the Dominican Grand Inquisitor, Tomas de Torquemada, in the late 14th century), there are still substantial grounds for the apology offered by Pope John Paul II for many of the actions carried out in the Church's name during and after the Renaissance and Reformation eras.

Two famous executions stand like bookends near the beginning and end of the 16th century – arguably the worst period of all. They were the burning alive with papal approval of the Dominican friar Girolamo Savonarola in Florence in 1498 and of the former Dominican Giordano Bruno in Rome in 1600. Many executions took place in the name of religion in England and other parts of Europe in the 16th century and beyond. Catholics venerate their martyrs from this period (the likes of Saints Thomas More, John Fisher and Edmund Campion), but we also remember with sorrow and respect the many Protestants whose lives were taken, for example during the short but bloody reign (1553–58) of the Catholic Queen Mary.

Although executions in the name of religion continued in the following centuries, it was an 18th century figure who helped to prepare the way for the more enlightened attitude that prevails in many places today. He was the Italian jurist Cesare Beccaria (1738-94), called the father of penal reform. His book *On Crimes and Punishments*,<sup>4</sup> published in 1764, rejected the state's right to take a citizen's life and helped to spread the message that the death penalty is cruel, irrational and ineffective as a deterrent. Nevertheless, the use of capital punishment continued to be widespread in most countries, including Australia, during the 19th and into the 20th centuries. At the same time, however, the number of capital crimes was being progressively reduced in many countries.

By the 20th century (the fifth period), philosophers and theologians, like social reformers, were becoming progressively more vocal in their criticisms of the death penalty. The ground for the development of the Church's current teaching was laid by Popes Pius XII and John XXIII in their writings and addresses, and, at the local level, by leaders such as the late Archbishop Daniel Mannix of Melbourne, a constant critic of the use of capital punishment. (Among other things, Mannix, like Pius XII, appealed unsuccessfully to President Eisenhower in 1953 to save the condemned spies Julius and Ethel Rosenberg from the electric chair.)

Pope John Paul II applied Pope John XXIII's teaching on the 'universal, inviolable and inalienable' dignity of the human person<sup>5</sup> explicitly to capital punishment, declaring that Catholics have an 'inescapable

responsibility of choosing to be unconditionally pro-life'.<sup>6</sup> Even before that, the Franciscan moralist Father G. Concetti had written that the right to life is 'primordial and inviolable' and the state lacks the right to take it away.<sup>7</sup> In similar vein, the theologian Jean-Marie Aubert had concluded in 1978 from his historical study of the phenomenon that capital punishment is an 'evil, barbaric institution, unworthy of any and every society today'. Comments made by senior officials of the Holy See about the execution of the dictator Saddam Hussein amount to a similar unqualified condemnation of the use of the death penalty, called by Cardinal Renato Martino 'a crime' that, according to Cardinal Paul Poupard, takes 'lives which belong to the Lord'.<sup>8</sup>

The United States bishops, collectively and individually, have echoed and applied Pope John Paul's teaching for over a quarter of a century. Their most recent statement on the subject, *A Culture of Life and the Penalty of Death*, was issued on 15 November 2005.<sup>9</sup> The bishops wrote:

*The death penalty presents Catholics with an unavoidable moral challenge. The Church's teaching, as expressed clearly and authoritatively in the Catechism and The Gospel of Life, should not be ignored or dismissed as just one opinion among others. Rather, Catholics are called to receive this teaching seriously and faithfully as they shape their consciences, their attitudes and ultimately their actions.*

By the end of 2006, however, 1057 executions, including 53 in that year, had taken place in the USA since the use of the death penalty was resumed in 1977. For several years before 1977, an abolitionist policy prevailed in the USA. By New Year's Day 2007, some 3,350 prisoners in the USA were under sentence of death.<sup>10</sup> There are signs now, however, of a gradual decline in support for capital punishment in that country. One factor has been the release of 123 death row prisoners since 1973, after evidence of their innocence emerged.

Another welcome event in 2005 was a decision by the US Supreme Court to conform with the UN Convention on the Rights of the Child by abolishing the execution of child offenders – those who were under 18 at the time of the crime. More than 70 child offenders were then removed from death rows. Several other countries, led by China and Iran, continue to execute juveniles. American abolition advocates are also directing their attention to the number of intellectually disabled people who have been executed or face execution.

## ***Australia and the death penalty***

Executions took place in Australia from almost the beginning of white settlement. The first recorded hanging was of Thomas Barrett, at Port Jackson (Sydney) on 27 February 1788, for stealing food from the public stores.<sup>11</sup> It is claimed that for much of the 19th century, 80 people on average were executed each year.

The frequency of executions decreased greatly in the 20th century, until the practice was fully abandoned 40 years ago. By 1985, the Commonwealth and all the states and territories had legally abolished capital punishment, although there had not been an execution in Australia for 18 years, since the hanging of Ronald Ryan in Melbourne on 3 February 1967.<sup>12</sup> Nevertheless, one hears calls for the return of the death penalty, especially in the wake of terrorist attacks such as those in New York, Washington, Bali, London, Madrid, Jakarta and elsewhere – and following such gruesome events as the Port Arthur massacre, the murders in the Belanglo State Forest and the rape and murder of Anita Cobby.<sup>13</sup>

In 2005, when a state parliamentarian proposed that the death penalty be reintroduced for serious crimes in Western Australia, Archbishop Barry Hickey of Perth said this would represent a ‘serious retreat from our standard of respect for human life’. Against the restorationist trend, we may recall that the Australian Bishops, in a 1998 Pastoral Letter marking the 50th anniversary of the Universal Declaration on Human Rights, confirmed that they would oppose any move to reintroduce capital punishment in this country.<sup>14</sup>

Public opinion on the issue can be fickle. Certainly most Australians seemed to be horrified in December 2005 by the hanging in Singapore of the Vietnamese-Australian drug-carrier, Van Tuong Nguyen (the subject of Fr Peter Norden’s accompanying essay). While less public concern was expressed at first over the sentencing to death of two Australians convicted of serious drug offences in Bali (two of the so-called ‘Bali nine’ arrested in April 2005), most members of the public were aghast when four other young offenders had their long-term prison sentences upgraded to the death penalty by the Indonesian authorities.

## ***Giving priority to life’s value***

If the Church is to implement the papal education program on this matter, a continuing effort will be needed to emphasise that the value of life is at the heart of the Church’s case. Spreading the Gospel of Life is an integral part of evangelisation.

For believers, this emphasis on the value of life and on human dignity is our principal argument, without our ignoring others, such as the fact that capital punishment has never been shown to be an effective deterrent; that mistakes can be made in determining the guilt of the accused; that death can deprive the executed of the possibility of repentance and conversion; that potentially useful or fruitful lives are extinguished prematurely; and that so many of the executed are the victims of racial prejudice or are disadvantaged people lacking education, resources and even access to an adequate legal defence.

In all this, the papal teaching is aligned with what the saintly American bishop, Cardinal Joseph Bernardin of Chicago, taught when supporting a ‘consistent ethic of life’ and likening pro-life issues to a seamless robe. It is hard to understand how some of those who oppose capital punishment also support abortion or euthanasia. By the same token, it is surely inconsistent for a few anti-abortionists to advocate the death penalty.

In discussing capital punishment and abortion, some will correctly point to two facts: first, that there are far more abortions than executions; and, second, that the victims of abortion are innocent creatures, while most of the executed are guilty of horrendous crimes. In all cases, however, respect for life should be at the heart of the Christian’s response to voluntary killings of all kinds. Central to our thinking, as those who are schooled in the Gospel of Life, should be an understanding of what any form of violence does to the individual, the group or the whole community causing or condoning it. This is what is most disturbing about capital punishment. It diminishes those who bring it about or advocate it. By responding to killing by killing, we are not only adopting a position that defies logic, we are helping to foster a mentality whereby lethal and violent solutions can be more readily chosen in other situations.

I believe this accurately represents the present position of the teaching Church. Some Catholics are undoubtedly sincere in dissenting from this, given that some of the arguments for capital punishment have a degree of force. (Arguments for and against the death penalty are discussed in Andrew Byrnes’s essay in this collection.) In discussing such sensitive and complicated issues, it is not helpful to paint opponents as extremists. But the example and teaching of Pope John Paul II and others should help to convince all Catholics and others of the strength of the case for the universal abolition of the death penalty.

## *A personal perspective on the death penalty*

In conclusion, let me offer a little information about my own interest in this matter. As a boy, I lived only a mile or so from Pentridge Prison in Melbourne, the site of many hangings over the years. I remember being troubled when hearing or reading of much-publicised executions in the 1940s and 1950s, such as those of the American soldier Edward Leonski during World War II and of Jean Lee and her two associates in 1951.<sup>15</sup>

When I was studying at Rome's Lateran University in the late 1950s and early 1960s, I came under the influence of a great teacher, Professor Camilo Corsanego, a lay jurist at the Vatican and authority on penal law, who held that the Church should never have defended the death penalty, much less made use of it, even indirectly through the 'secular arm'.

During the 1960s, when I edited the Melbourne Catholic *Advocate*, people such as Barry Jones helped me to prepare mentally and psychologically to play a small part in the controversy that erupted late in that decade. The then Victorian Premier, Sir Henry Bolte, made it clear that nothing would stop him from ensuring that Ronald Ryan would hang. He pursued his course in the face of much opposition from community and church leaders.

During my years working for the Australian Bishops in the area of social justice and human rights (1987–2005) I continued to take a special interest in this major pro-life issue. In 2000, the Australian Catholic Social Justice Council published my paper *The Death Penalty: Why Catholics Should Oppose It*.<sup>16</sup> I have mentioned some developments since then. Another important one, in this age of terrorism, is an apparent weakening of resolve by certain Australian political leaders who might previously have had no reservations about their abolitionist ideals – another issue that Andrew Byrnes discusses in his essay.

## ***Conclusion***

In opposing the death penalty, one should try to avoid giving the impression that sympathy for the victims of crime and those close to them is being overlooked. It is understandable that some find it difficult, if not impossible, to forgive. In certain circumstances, it can be more difficult to arrive at forgiveness than to adopt any other human attitude. But nothing is achieved by reprisal or a payback mentality. As the Popes have pointed out repeatedly, even the most heinous crime can be adequately punished in today's world by means other than taking the life of the perpetrator. Until that is accepted, there will be an urgent need to continue spreading the Christ-like message of the Gospel of Life.

## ***Michael Costigan***

Dr Michael Costigan holds a doctorate *Summa cum Laude* in Canon and Civil Law from the Pontifical Lateran University and a Licentiate in Theology from Rome's Pontifical Urban University. He has held many influential posts in the Catholic Church in Australia, including Executive Secretary to the Bishops' Committee for Justice, Development, Ecology and Peace. His long career also includes posts as a public servant and as a journalist (including as associate editor of the Melbourne *Advocate*), and he has served as Director of the Literature Board of the Australia Council.

Dr Costigan is now an Adjunct Professor at the Australian Catholic University and chairs the Archdiocese of Sydney Justice and Peace Advisory Council. He has published many writings on Catholic Church affairs, human rights, social justice issues and Australian literature.

## Notes

1. N.2267. See [www.scborromeo.org/ccc/p3s2c2a5.htm#I](http://www.scborromeo.org/ccc/p3s2c2a5.htm#I).
2. *Evangelium Vitae* ('The Gospel of Life') 1995, par. 56. See [www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).
3. *New Catholic Encyclopedia* Catholic University of America, Washington DC, Vol. 3 pp 83–87. The article is written by DR Campion, EJ Dillon and James J Megivern. Much valuable material can be found in Megivern's monumental 641-page work *The Death Penalty: an Historical and Theological Survey*, Paulist Press, New Jersey, 1997. The entry in *The New Catholic Encyclopedia*, however, is more digestible.
4. *Dei Delitti e Delle Pene*. An English version can be found in *On Crimes and Punishments and Other Writings*, ed. Richard Bellamy, trans. Richard Davies with Virginia Cox and Richard Bellamy, New York, Cambridge University Press, 1995.
5. *Pacem in Terris*, pars. 9–10.
6. *Evangelium Vitae* (see note 2) par. 28.
7. *L'Osservatore Romano*, 20 February 1977.
8. Cardinal Renato Martino, President of the Vatican's Pontifical Council for Justice and Peace, made several strong comments on the Saddam Hussein sentence and actual execution. On 28 December 2006 (two days before the hanging) he told Italy's *La Repubblica* newspaper that 'one does not compensate for one crime with another crime'. On 5 November 2006 he had used similar language in an interview with the Italian news agency ANSA. He is quoted in *CACP News Notes*, published by Catholics Against Capital Punishment, Bethesda, Maryland (6 January 2006). Cardinal Paul Poupard, President of the Pontifical Council for Interreligious Dialogue and of the Pontifical Council for Culture, was quoted by CACP News Notes (11 August 2006). He had been interviewed by ANSA on 21 June 2006.
9. *A Culture of Life and the Penalty of Death*, United States Conference of Catholic Bishops, Washington DC 2005. <http://www.usccb.org/sdwp/national/penaltyofdeath.pdf>.
10. <http://web.amnesty.org/pages/deathpenalty-facts-eng>
11. 'The Death Penalty in Australia and Overseas', NSW Council for Civil Liberties background paper 2005/3.
12. Ryan was convicted of the murder of a warder, George Hodson, during his escape from Pentridge. See the Australian Dictionary of Biography online: <http://www.adb.online.anu.edu.au/biogs/A160185b.htm>.
13. Martin Bryant killed 35 people and wounded 37 in Port Arthur, Tasmania, on 28 April 1996. Ivan Milat was convicted of murdering seven people during the 1980s and '90s: their bodies were hidden in the Belanglo State Forest in NSW. Anita Cobby was raped and murdered by five men in Sydney in 1986.
14. *A Milestone for the Human Family*, Pastoral Letter issued by the Catholic Bishops of Australia to mark the 50th Anniversary of the Universal Declaration of Human Rights, 10 December 1998. See <http://www.abc.catholic.org.au/bc/jdep/1998121010.htm>.
15. Edward Leonski was executed in November 1941 for the murder of three women in Melbourne; see <http://www.adb.online.anu.edu.au/biogs/A150105b.htm>. Jean Lee, Robert Clayton and Norman Andrews were executed for the murder of William Kent. Lee was the last woman executed in Australia.  
See <http://www.adb.online.anu.edu.au/biogs/A150094b.htm>.
16. Catholic Social Justice Series No. 40.

# The death of Van Tuong Nguyen

*Peter Norden SJ*

At 8am on Friday, 2 December, 2005, in the Melbourne suburb of Richmond, the bells of St Ignatius' Church rang 25 times.

The bells sounded over the cries and wailing of many of the 1000 people who had gathered to pray during the moment of the execution of an Australian citizen, Van Tuong Nguyen. Van was executed at Changi Prison by officials of the Singapore Government, who placed a noose around his neck and let him drop through a trap door to his death.

Each of the 25 bells that morning represented a year of the life of this young man, whose family had been part of the community of that parish during his first years.

☆☆☆

Kim Nguyen is Van's mother. She left Vietnam in 1980. She travelled on her own and spent several months in a refugee camp in Indonesia. During that time she gave birth to twin boys, Van and Khoa. When the young family were given passage to Australia, they arrived in Richmond and soon took up residence in a public housing estate in Church Street.

Van and Khoa, as little boys, attended the St Ignatius' parish kindergarten and later St Ignatius' Primary School for some years. Kim was an attentive and loving mother, supporting them and guiding them through their early years of childhood. Her life journey had taught her to be strong, forging a life for her two young boys. Little did she realise how deeply she would have to draw on that strength in later years.

Before Van and Khoa completed their primary school education, the family moved to outer suburban Springvale, where they boys completed their high school education.

Almost 20 years later, as parish priest of St Ignatius' Church, I was told by one of our parish school teachers that the young man on death row in Singapore was one of the two young Vietnamese twin boys who had attended our parish kindergarten and primary school in the mid-1980s. Van had been arrested, as he passed through the transit lounge at Singapore airport, for bringing a quantity of heroin from Thailand to Australia.

Our parish community wanted to express their commitment and support for him, his mother and his brother in some way. We began a small prayer vigil in the church at the side altar consecrated to the Blessed Virgin.

I visited Julian McMahon, who, along with Lex Lasry, had generously provided legal representation and defence for Van Nguyen in the criminal courts of Singapore for more than two years. Julian gave me a photo of Van from his school days at St Ignatius' Primary School. We placed it on the side altar of the Blessed Virgin Mary, surrounded by flowers and prayer vigil candles.

Each day, as local people gathered for mass or private prayer, the number of those who joined in the prayer of intercession grew in number.

*Remember, O Blessed Virgin Mary,  
that never was it known in any age,  
that anyone who fled to your protection,  
implored your help, or sought your intercession  
was abandoned ...*

We prayed this prayer of intercession, which we called 'A prayer for the right to life of Van Nguyen'.



Joining in this prayer with the local Richmond community took me back in time, to a meeting with Cardinal Roger Etchegaray in Rome in 1990. The Cardinal was the President of the Pontifical Commission for Justice and Peace. I attended the meeting as the representative of the Catholic Bishops Conference, as a representative of the Australian network of Catholic prison chaplains. There were about 30 other chaplains present, representing the Catholic prison chaplains of various countries.

We asked the Cardinal why it was that the Catholic Church (at that time) seemed unclear on the defence of human life with respect to capital punishment. The then current version of the Catholic Catechism did not explicitly reject capital punishment as contrary to the Church's belief in the value and dignity of human life. The Cardinal replied that this was a complicated issue and that circumstances varied a great deal from country to country. His response was met with agitation and criticism from the prison chaplains.

Later that week, a group of us were granted a private audience with Pope John Paul II. We had prepared a statement that reflected the major interests and concerns of the international network of Catholic prison

chaplains. One of the issues we raised was the importance of clarifying the Church's pastoral teaching about capital punishment, and the need to uphold the right to life of all people, no matter what their circumstances.

John Paul II listened thoughtfully and with an open heart. His response to the gathering was encouraging and uplifting. Many of the chaplains present had worked in very difficult circumstances: in Northern Ireland with the IRA hunger strikers and in Rwanda with those accused of mass genocide.

Not long after our meeting, the teaching of the Church, as articulated in the Catholic Catechism, was updated to include capital punishment as an example of the denial of the right to life. And in the remaining years of his papacy, John Paul II made frequent appeals to governments around the world in defence of those on death row, speaking out against the death penalty.

☆☆☆

Van Nguyen was just one of thousands of convicted criminals facing the death penalty at the time. He is one of more than 400 prisoners hanged by the Singapore Government since 1991. With a population of just four million, this gives the Singapore Government the dubious title of having the highest rate of execution per capita of any country in the world.

Executions in the United States are well publicised, but it is worth calling to mind that Singapore executes its prisoners at nine times the rate of the USA, and executions in Singapore rarely rate a mention in the local government-controlled media.

The execution of Van Nguyen, too, received little publicity in Singapore in December 2005, despite the fact that his circumstances attracted the personal intervention of two popes, John Paul II and our current Pope Benedict XVI.

One wonders whether those countries that place their emphasis on material progress and economic growth are the ones that least value human life.

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During the weeks preceding Van Nguyen's execution, an increasing number of those who stood for his right to life came to pray before the replica of Michelangelo's *Pietà* in St Ignatius' Church. The statue

portrays the mother of Jesus holding her son's body in her arms. He has just been taken down from the cross, a victim of capital punishment – and, in his case, the innocent victim of an unfair trial. Mary's face is youthful, yet timeless. Her head leans slightly over the lifeless body of her son.

Van Nguyen was not innocent of the crime of which he was convicted. He had admitted his guilt and cooperated with criminal investigation authorities in Singapore and Australia. The question raised by many international bodies at the time was whether he deserved to die.

The Singapore Penal Code provides for a mandatory death sentence for a broad range of offences, including murder, attempted murder and 20 different drug offences. In such cases, the criminal court is deprived of any discretion to consider the circumstances in which the crime was committed. Resultant decisions are often observed to be arbitrary and disproportionate to the crime.

Different countries, of course, have different criminal sanctions, and some have argued that Australians have no right to criticise the criminal sanctions of neighbouring countries. Regardless, however, of national sovereignty and differences between penal codes, this raises the critical issue of the place of human rights in any civilised society and the question whether there could be such a thing as a universal right, such as the right to life.

The right to life is not the only right, but in most societies it is now recognised as an absolute right, one against which other rights are to be balanced. The right to have private property, to accumulate wealth, to build a prosperous society, to defend one's privacy and independence – these rights are not absolute rights and are to be balanced by a deeper, more abiding right: the right to life.

It has become clear that, in those countries where executions are still carried out, most of those who lose their life to the power of the state represent the most vulnerable, marginal, economically deprived members of that society.

Many Australians were awakened to the inherent injustice of capital punishment when an Australian national, Van Nguyen, found himself on death row in Changi Prison in 2005. The imposition of a mandatory death sentence was widely recognised as unjust in this particular case.

But the voices of so many Australian people seemed to fall on deaf ears and hard hearts in the Singapore Government during those final months of appeal.

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While there is some difference of opinion in Australia on the question of capital punishment, we can rejoice that in this country there is public debate about the issue. Some suggest that the Australian community seems equally divided between those who support the death penalty here or overseas and those who are opposed to capital punishment. Fortunately, it is no longer an issue for the Australian courts and legislature, and given the abolition of the death penalty in this country some decades ago now, we can probably remain confident that it never will be.

Many have asked whether the Australian Government could have done more to represent Van's interests at the time, and whether they could do more now to represent the interests of the six young Australians who, at the time of writing, face the death penalty in Indonesia.

Australian Government officials and representatives constantly reported in relation to the case of Van Nguyen that they had engaged in numerous private negotiations and representations with the Singapore Government. Several weeks before his execution on 2 December 2005, the Prime Minister, John Howard, and the Foreign Minister, Alexander Downer, both suggested that they had already done all that was possible.

Many in Australia would have liked to have heard a clearer statement from the Prime Minister: that he opposed the execution of this young Australian by the Singapore Government and that the Australian Government opposes capital punishment everywhere and in all cases. Such a statement was never made in relation to Van Nguyen and to date has not been made in relation to the young Australians on death row in Bali.

But should our concern as Australians be restricted simply to the fate of Australian citizens facing the death penalty in other jurisdictions, or do we as a country committed to universal human rights have a responsibility for arguing for the right to life of all citizens, of whatever nationality or citizenship? To express Australia's policy firmly, clearly and consistently is not to undermine or compromise the sovereignty of

other governments. Furthermore, we weaken our arguments when we campaign against the death penalty for Australians but stand by when citizens of other countries are executed.

Certainly, it is critical to establish clearly the basis for the teaching of the Catholic Church in relation to the death penalty. That teaching has nothing to do with the guilt or the innocence of the person concerned; it is now an absolute and clear teaching about the value and dignity of all human life.

The journey of Van Nguyen to the gallows at Changi Prison in December 2005 helped many Australians to appreciate the truth and the value of this teaching.

### ***Peter Norden SJ***

Peter Norden is a Jesuit priest, the Parish Priest of St Ignatius' Church in Richmond. From 1985 to 1992, he worked as Senior Catholic Chaplain in Melbourne at Pentridge Prison, the place of the last execution in Australia, that of Ronald Ryan in 1967.

Fr Norden is the Associate Director of Jesuit Social Services, an Adjunct Professor in the School of Social Science and Planning at RMIT University, a National Board Member of the Australian Council of Social Service and the Convenor of the Victorian Criminal Justice Coalition. He worked in conjunction with Professor Tony Vinson on a now famous social survey that mapped the concentration of poverty in Australia by postcode.

On Australia Day 2007 Fr Norden was appointed an Officer in the Order of Australia for 'service to community development through social research and programs to help marginalised young people and offenders, to the mental health sector and to the Catholic Church'.

# Thinking about Joshua

*Brian Deegan*

October 12 is the anniversary of Joshua's death. But for parents, anniversaries are symbolic only. Love, pride and in particular grief do not recognise dates.

I am the father of four beautiful children. In October 2002, my eldest child Josh pleaded to go to Bali with his team-mates from the Sturt football club. The previous week, against the odds, the club had won the South Australian National Football League grand final. On the very day of their arrival in Bali, terror struck. Josh and another team member died. His mates were injured.

At the time I was a magistrate, and had been for 16 years. I left the position to contest the 2004 election. I was bitterly opposed to the war in Iraq and Australia's foreign policy. I feared then for the future of Australia and, in particular, for my remaining three children. I have regained some degree of stability in my life and recommenced in legal practice. But life, I have come to accept, will never be the same as I once knew it.

Josh was 22. Educated to tertiary level, he achieved a Bachelor of Applied Science degree. He was a finely tuned athlete with Hollywood looks. But I think I best described him at his funeral when I said 'whoever coined the phrase "beauty is only skin-deep" ne'er had the opportunity of meeting Josh'. Josh deplored violence, both on and off the field. He deplored poverty and misery. He detested war. If the attack on the Sari club in Bali was in retribution for the innocents lost in Afghanistan, then, ironically, the assassins took an ally rather than an opponent.

*1 August 2007*

It is 12 noon and I am driving away from Joshua's graveside in Adelaide's Centennial Park. As is my wont, I have visited on my way back from court. To talk. I buried him alongside my grandparents. To this day, almost five years since he was taken from me, I still look about and am overcome with a sense of unfitness, of impropriety. He shouldn't be there, where he is, unaccompanied. He is and will always be 22 years of age and no more.

Despite the passage of time I rarely sleep. Too often I spend the early hours of the morning walking, watching, waiting, praying that this is a nightmare from which, at some stage I must awake. Yet cold reality set in long ago. I know in my heart that, at least in this life, I shall never again speak with my son. Never again shall I laugh with him, drink with him, discuss his future or watch him play football. Nor will I witness him marry, or father children. The philosopher Max Beerbohm once observed, 'Have you noticed, there is never any third act in a nightmare? They bring you to a climax of terror and then they leave you there.'

I take solace in the knowledge that I still have three beautiful children.

### ***11 October 2002***

I stood at the front door and waved farewell to Josh. He was embarking upon his first trip away from the family, travelling with team-mates to an emerald isle in the Indonesian archipelago. We embraced. He suggested gifts with which he would return the following week. He suggested for me a carved elephant – a symbol of strength. I subsequently bought my own.

We spoke briefly about our venture to be undertaken upon his return – a house, in much need of repair, that we had jointly purchased. I sold it.

### ***February 1967***

It was almost my 12th birthday. My family had transferred to Melbourne as a result of my father's employment. Nightly news covered scenes of mass protests in the streets of Melbourne and across Australia. Ronald Ryan was due to be executed in Pentridge Prison the following day. He had shot and killed a warder during an escape two years earlier. My father's words at the time still resonate. The hanging was, he said, 'a barbaric act and one that was to be carried out for political gain. This was Australia and the twentieth century.'

From that time I was attuned to the issues of crime and punishment. I have subsequently read many articles on the subject, and in particular on death. Death at the hands of the criminal, death at the hands of a mob, death at the hands of the state for political expediency and death at the hands of the state in the name of justice – to exact retribution, impose deterrence and the like.

At university, I read case studies involving mistaken identity, false accusations and flawed scientific evidence. In more recent times I have been made aware of the impact of former President Bill Clinton's decree that all persons on death row should have available to them, as a safety net, the modern scientific tool of DNA testing. The effect was that hundreds of African-American prisoners were set free.

### ***September 2003***

Following his arrest on 5 November 2002 and subsequent trial, Amrosi (the so-called smiling assassin) was sentenced to death on 7 August 2003, convicted of murdering my son and hundreds more. Imam Samudra, arrested as he was attempting to flee Malaysia in November 2002, was returned to Bali, where he stood trial. Found guilty, he was sentenced to death on 10 September 2003.

In the days leading up to the court's judgement on Amrosi, I was contacted by many in the Australian media. Did I have an opinion? I did. I held a very strong opinion, but was uncertain as to whether I should disclose it.

The exposure of human frailties and the resources of modern science were sufficiently compelling for me to oppose capital punishment well before Josh's death. To adopt a different philosophy would have been opportunistic, hypocritical and vengeful. It would be a betrayal of a code of behaviour I have instilled in my children. But it was Josh who died and I felt that I was then being asked to speak on his behalf. I had to be sure.

I visited his grave and for a full day sat silently seeking some form of guidance. Just as when he was alive, I took an iced coffee for him and one for me. We talked. We talked for hours. It was beautiful, spiritual, comforting, but an experience only one who has lost a loved one would understand.

I knew my children well and, returning home, felt confident that I could truly speak on Josh's behalf. Apart from the usual interviews with the media, I wrote, at the suggestion of a friend, an article that was published in *The Australian*. It still represents my belief.

*... Death awakens all manner of emotions and murder excites more.*

*To varying degrees, revenge and purgation have formed part of the judicial process since the Garden of Eden. Similarly, in its many and flexible forms, capital punishment has been considered by some*

*philosophers as not only a means of atonement but also a justifiable deterrent.*

*As a measure employed to dissuade potential criminals, the death penalty has been an abject failure. This is borne out by statistics that point to the commensurate rise of murders and executions in countries where capital punishment is awarded.*

*The argument in favour of capital punishment remains difficult to reconcile with the universal revulsion generated by periods in history when society thought nothing of hanging a child or burning a witch. We read with disgust – or perhaps with guilt – of the stoning of adulterers, the removal of the thief's hand or the decapitation of a blasphemer. Yet we find it palatable to break a man's neck, to poison his veins or to electrocute him.*

*The suggestion that Amrosi and his fellow evildoers should face an Indonesian firing squad is unconscionable because that would make the punishment as barbaric as the crime. What the Bali bombers did to my child and to the hundreds of others defies description. But the October 12, 2002 terrorist attacks do not give anyone the right to repeat such a vile act ...*

The Australian **9 July 2003**

## **2007**

Convicted of murdering my son and hundreds more, Amrosi still awaits his fate. He has been defrocked, uncrowned, isolated and segregated. The demonic grin that once served its master well is thankfully gone; fear and his conscience are his constant companions.

The vision of my son's murderer, seated uncomfortably on the harsh concrete floor in a room bare of the conveniences he had once taken for granted, evokes little sympathy. But the prospect of him picking at grains of rice from his last meal is something I wish no part of.

I do not wish for death of those convicted, for I oppose the death penalty under any circumstances. But due to my own shortcomings, while I have understood the murderers' motives, I have yet to find forgiveness and therefore cannot pray for their lives.

## ***Brian Deegan***

Brian Deegan is an Adelaide-based lawyer. He served as a magistrate and a member of the South Australian Youth Court from 1988 to 2004, has been a member of the SA Police Tribunal and was SA Football League Junior Football Coach of the Year in 1999.

Brian Deegan was born in Adelaide and was educated there and in Melbourne, graduating from the University of Adelaide in 1979. He is the father of four children: Joshua, Nicholas, Eloise and Patrick. In 2004, he resigned from the magistracy to contest the federal election. He returned to general legal practice in 2005.

Brian Deegan is the author of *Remembering Joshua*, published by Allen and Unwin in 2004. He is also a columnist for the *Adelaide Review*.

# **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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Table 1 shows the clear trend towards restriction and abolition (*de iure* and *de facto*) of the death penalty.

	<b>Completely abolitionist</b>	<b>Abolitionist for ordinary crimes</b>	<b>Retentionist – de facto abolitionist</b>	<b>Retentionist</b>
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 Nations<sup>4</sup>

More recent figures provided by Amnesty International indicate that the trend continues.<sup>5</sup> 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).<sup>6</sup>

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:<sup>7</sup>

*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:<sup>8</sup>

*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.<sup>9</sup>

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

## ***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,<sup>11</sup> the eminent South African judge, Justice Ismail Mahomed,<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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<sup>17</sup> states that 'Everyone has the right to life', while Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR)<sup>18</sup> 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.<sup>19</sup> This means that there are certain circumstances in which a person may be lawfully and non-arbitrarily deprived of his or her life.<sup>20</sup>

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)<sup>21</sup> and referred to on many occasions in resolutions of the UN General Assembly, the former UN Human Rights Commission<sup>22</sup> 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.<sup>23</sup>

### **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.<sup>24</sup>

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:<sup>25</sup>

*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)<sup>26</sup> 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.<sup>27</sup>

### **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,<sup>28</sup> 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.<sup>29</sup>

### **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*.<sup>30</sup>

### **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,<sup>31</sup> 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.<sup>32</sup>

### **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.<sup>33</sup> 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.<sup>34</sup> 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.

<b>Jurisdiction</b>	<b>Abolished</b>	<b>Last execution</b>
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 <sup>35</sup>	1955/1985	1940

**Table 2: Abolition of the death penalty in Australia.**<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> However, there is no absolute bar on return and it is for the Attorney-General<sup>41</sup> to decide whether the undertaking offered can be relied on.<sup>42</sup>

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.<sup>43</sup> 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’.<sup>44</sup>

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’.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> As Colin McDonald QC notes,<sup>49</sup> 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'.<sup>50</sup>

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?<sup>51</sup>

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'.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> Similar comments have been made by senior members of the Opposition.<sup>55</sup> 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).<sup>56</sup>

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 Qaeda 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.<sup>57</sup> 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.<sup>58</sup> 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).
2. 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](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.
5. 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).
9. 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](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](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](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.
  23. 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](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.

32. *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\\_Mutualassistance\\_Mutualassistanceindeathpenaltymatters](http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Mutualassistance_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\\_penalty.html](http://www.humanrights.gov.au/about_the_commission/speeches_president/death_penalty.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/\\_02PP\\_Autumn/\\_bronitt.asp](http://info.anu.edu.au/mac/Newsletters_and_Journals/ANU_Reporter/097PP_2006/_02PP_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](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-says-howard/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.html>; 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](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>.



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