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## Introduction

In the aftermath of the executions of Australian nationals Andrew Chan and Myuran Sukumaran in Indonesia, we commend the Joint Standing Committee on Foreign Affairs, Defence and Trade for initiating this Inquiry into *Australia's Advocacy for the Abolition of the Death Penalty*. In this submission, we first identify the legal markers of Australia's opposition to capital punishment. We then evaluate Australia's current engagement in the abolitionist movement. Finally, we consider further steps Australia could take to strengthen its abolitionist stance and persuade other nations to abandon the practice of capital punishment.

## Australia's Legal Position on Capital Punishment

In 1973, the Australian parliament passed legislation prohibiting capital punishment for any federal crime.<sup>1</sup> Some states did not remove capital punishment formally until after that time, but any death sentence handed down after 1973 was commuted by the courts to life imprisonment.<sup>2</sup> Current Australian law is unequivocal in its rejection of capital punishment.

In 2010, Australia passed the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act*, which had the effect of prohibiting capital punishment in all Australian jurisdictions.<sup>3</sup> Further, Australia acted to ensure that a person may only be deported to another country to face trial where an assurance has been given that the death penalty will not be imposed as a punishment.<sup>4</sup> These legislative changes enacted Australia's commitment to the Second Optional

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<sup>1</sup> Section 4, *Death Penalty Abolition Act 1973* (Cth)

<sup>2</sup> See Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659, 668-681.

<sup>3</sup> Via the amended Section 6, *Death Penalty Abolition Act 1973* (Cth).

<sup>4</sup> *Extradition Act 1988* (Cth), s22(3)(c)

Protocol to the ICCPR.<sup>5</sup> In his second reading speech for the 2010 Bill, then Attorney-General Robert McClelland explained Australia's abolitionist stance:

[The proposed Bill] will ensure that the death penalty cannot be reintroduced anywhere in Australia in the future. ... Such a comprehensive rejection of capital punishment will also demonstrate Australia's commitment to the worldwide abolitionist movement and complement Australia's international lobbying efforts against the death penalty. ...this bill contains important measures which again demonstrate this government's ongoing commitment to better recognise Australia's international human rights obligations.<sup>6</sup>

### **Australia's Current Engagement in the Abolitionist Movement**

Recent Australian governments have taken a range of steps to demonstrate their commitment to the abolition of capital punishment. For example, Australia has called on other states to abolish the death penalty, sponsored UN General Assembly resolutions proposing a moratorium on executions, and lobbied for clemency for all Australian nationals facing execution.<sup>7</sup> Australia also established new guidelines for the international law enforcement efforts of the Australian Federal Police, following the conviction of Chan, Sukumaran and the other members of the Bali Nine.<sup>8</sup> These guidelines require senior AFP management to consider whether and how to provide assistance to foreign law enforcement agencies in cases where it is possible that a person may face the death penalty as an eventual result of that assistance.<sup>9</sup>

Notably, the Australian government lobbied Indonesia in a strong and consistent manner for clemency for Chan and Sukumaran. Foreign Minister Julie Bishop was particularly prominent in these efforts. Bishop and others in government frequently emphasised the men's rehabilitation as a primary justification for sparing their lives. On 12 February 2015, Bishop stated in federal Parliament:

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<sup>5</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/RES/44/128 (entered into force 11 July 1991).

<sup>6</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 19 November 2009, 12197 (Robert McClelland, Attorney-General).

<sup>7</sup> Greg Carne, 'Abolitionist or Relativist? Australia's legislative and international responses to its international human rights death penalty abolition obligations' (2011) 3 *University of Western Sydney Law Review* 40, 47-48.

<sup>8</sup> Greg Carne, 'Abolitionist or Relativist? Australia's legislative and international responses to its international human rights death penalty abolition obligations' (2011) 3 *University of Western Sydney Law Review* 40, 49.

<sup>9</sup> AFP Governance, 'AFP National Guideline on international police-to-police assistance in death penalty situations' (2010) < <http://www.afp.gov.au/~media/afp/pdf/ips-foi-documents/ips/publication-list/afp%20national%20guideline%20on%20international%20police-to-police%20assistance%20in%20death%20penalty%20situations.pdf>>.

Both men are deeply, sincerely remorseful for their actions. Both men have made extraordinary efforts to rehabilitate. Andrew and Myuran are the model of what penal systems the world over long to achieve... A decade on from their crimes, Andrew and Myuran are changed men. They are deeply committed to a new path. Both men are paying their debt to society. With dedication and unwavering commitment, they are improving and enriching the lives of their fellow prisoners.<sup>10</sup>

In its lobbying of Indonesia, Australia also emphasised its opposition to capital punishment in all cases. Foreign Minister Julie Bishop described Chan and Sukumaran's sentence as a 'grave injustice'. She noted Australia's 'strong opposition to the death penalty at home and abroad.'<sup>11</sup> However, beyond this general expression of 'opposition' to capital punishment, Australia did not emphasise specific human rights principles in its lobbying of Indonesia for clemency.

Ultimately, Australia's advocacy for Sukumaran and Chan was determined and genuine but unsuccessful on both key measures; Australia's nationals were executed, along with six others, and Indonesia remains determined to carry out the death penalty against drug offenders. It is therefore timely and important for Australia and Australians to step back from the immediate case and confront the broader reality of capital punishment globally. We hope that this Inquiry may empower Australia to adopt a more considered and effective strategy for opposing capital punishment and contributing to the global abolition movement.

### **Strengthening Australia's Advocacy for Death Penalty Abolition**

In the weeks following the executions of Chan and Sukumaran, some prominent commentators from across the political spectrum have advocated for Australia to build its anti-death penalty advocacy worldwide. For example, former Howard government minister Peter Reith asked whether it should make any difference to Australia's response if a planned execution involves Australians or not.<sup>12</sup> Current Coalition MP Philip Ruddock has approached the diplomats of other states whose nationals have been or face execution in Indonesia, asking them to join with Australia in advocating for abolition. Simultaneously, however, the most recent federal budget saw foreign aid drop from \$5.03

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<sup>10</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2015, 656 (Julie Bishop, Foreign Minister).

<sup>11</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2015, 656 (Julie Bishop, Foreign Minister).

<sup>12</sup> Peter Reith, 'Why no outcry over death penalty in the US?', *Sydney Morning Herald* (online), 18 May 2015 <<http://www.smh.com.au/comment/why-no-outcry-over-death-penalty-in-the-us-20150518-gh40v2.html>>.

billion in 2014-15, to a projected \$4.05 billion in 2015-16.<sup>13</sup> If Australia seeks to change the policy stance of other states in relation to capital punishment, it risks rebuff on the basis that it provides little support in other areas in times of crisis.

For Australia to move towards a stronger abolitionist position, an early consideration should be which means of advocacy will be most effective. Withdrawing ambassadors in protest, as happened following the executions of Sukumaran and Chan, is unlikely to change the policy positions of foreign governments. Other efforts which may be more effective include increased engagement and dialogue, working with Indonesia and other death penalty states to free their nationals facing capital punishment in foreign jurisdictions, and developing nuanced bi-lateral and regional approaches to drug trafficking. However, all these approaches rely on Australia being perceived as a consistent objector to capital punishment in the first place. In the following sections, we outline some means by which Australia could more effectively inform and project its abolitionist advocacy globally.

### *Engaging with human rights arguments*

Ultimately, Australia's opposition to the death penalty is grounded in a particular understanding of the value of human life. The former Chief Justice of the South African Constitutional Court, Ismail Mahmood, reinforced the value of human life when he described execution as the '...destruction of the greatest and most precious gift which is bestowed on all humankind.'<sup>14</sup> It is this gift of human life that provides the focal point of the international legal framework of human rights. Australia's advocacy for the abolition of capital punishment may be strengthened by locating our efforts within the body and spirit of human rights law.

The most relevant legal principle in this context is the right to life. The right to life is the foundation principle of the Universal Declaration of Human Rights and the international legal framework that has been built around it. Article 3 of the Declaration explicitly states 'everyone has a right to life',<sup>15</sup> reflective of the post-WWII focus on entrenching human rights protections and preventing further mass state-sanctioned killings.<sup>16</sup> There are no limitations to the right to life under human rights law –

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<sup>13</sup> Refugee Council of Australia, *2015-16 Federal Budget in Brief*, 3 < <http://www.refugeecouncil.org.au/wp-content/uploads/2014/08/2015-16-Budget.pdf>>.

<sup>14</sup> *State v Makwanyane* 1995 (3) SA 371; 6 BCLR 665 at paragraph 265

<sup>15</sup> *Universal Declaration of Human Rights*, GA Resolution 217 A (III) (1948), Article 3.

<sup>16</sup> Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (State University of New York Press, 2007), 2.

it must always be respected.<sup>17</sup> The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, obliges states to work for the abolition of the death penalty globally on the basis that capital punishment violates the right to life.<sup>18</sup>

The ICCPR acknowledges that some states continue to impose capital punishment, despite the fact that this violates the right to life. However, in its abolitionist advocacy, Australia ought to emphasise that the ICCPR obliges those states to only impose capital punishment for the most serious of crimes.<sup>19</sup> Some states execute people for actions that would not be regarded as crimes in Australian society, such as adultery in Afghanistan or sorcery in Saudi Arabia. Some states execute people for crimes that would be punished by custodial sentences or via civil remedies in Australia, such as graft in China or drug offences in Indonesia.

Another human rights basis for future Australian advocacy lies in the prohibition on torture. Capital punishment is a violation of the right to freedom from torture and inhuman or degrading treatment or punishment.<sup>20</sup> The prohibition of torture is a *jus cogens* standard under international law.<sup>21</sup> Not only does capital punishment inflict inhumane pain and suffering at the time of execution, but it imposes long periods – sometimes many years – of mental anguish on death row inmates. Further, some people sentenced to death have been subjected to torture as a means of extracting their confessions.<sup>22</sup> Not only is this a human rights violation, it also calls into question the legitimacy of any information obtained under such circumstances, as a person subject to torture could be motivated to say what they believe the torturer wants to hear. None of the methods used to carry out death sentences can be shown to be 'humane' or painless.

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<sup>17</sup> Andrew Byrnes, 'The Right to Life, the Death Penalty and Human Rights Law: An International and Australian Perspective' [2007] *University of New South Wales Faculty of Law Research Series* 35.

<sup>18</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/RES/44/128 (entered into force 11 July 1991).

<sup>19</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 6(2).

<sup>20</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>21</sup> *Jus cogens* is a category of international legal norms which are regarded as peremptory and non-derogable standards. See Erika de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97 citing *Prosecutor v Anto Furundžija (Trial Judgment)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia, 10 December 1998.

<sup>22</sup> Shetty reports the prevalence of this practice in Iraq in recent years, particularly in relation to people convicted of offences under the 2005 Anti-Terrorism Law: Salil Shetty, 'The Value of International Standards in the Campaign for the Abolition of the Death Penalty' (2014) XXI (1) *The Brown Journal of World Affairs*, 41, 50.

Since 1990, Amnesty International has documented 90 executions of child offenders (people younger than 18) in 9 retentionist countries.<sup>23</sup> Under international human rights law, there exists a *jus cogens* norm prohibiting the execution of children.<sup>24</sup> Along with this, the *United Nations Convention on the Rights of the Child* states that a child is 'every human being below the age of eighteen years unless the law applicable to the child, majority is attained earlier'.<sup>25</sup> It was only in 2005 that the US Supreme Court discontinued the use of capital punishment for those who committed a crime while under the age of 18.<sup>26</sup> Capital punishment when used in such circumstances should also be considered a violation of the rights of the child and Australia must identify it as such, including in cases where our trading partners seek to execute children.<sup>27</sup>

### *Emphasising pragmatic objections to the death penalty*

While we advocate for Australia to more strongly imbue its abolitionist efforts with human rights arguments, we also note the variety of strong pragmatic arguments against capital punishment. Australia may choose to emphasise these in certain cases, particularly in lobbying states which do not have strong human rights cultures.

The practice of capital punishment risks the killing of innocents. Former Australian Prime Minister John Howard objected to the death penalty, not so much on the basis of human rights concerns, but for 'pragmatic' reasons, including the need to prevent the execution of innocents.<sup>28</sup> Where the integrity of a justice system is in doubt, the likelihood is greater that innocents may be subjected to capital punishment.<sup>29</sup> In the United States alone, more than 150 innocent and likely innocent death

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<sup>23</sup> Amnesty International, *Executions Of Juveniles Since 1990* (20 August 2015) Amnesty <<https://www.amnesty.org/en/documents/ACT50/2306/2015/en/>>.

<sup>24</sup> Francisco Forrest Martin et al, *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (Cambridge University Press, 2011) 339.

<sup>25</sup> *Convention on the Rights of the Child*, GA Res 44/25, UN GAOR, 61<sup>st</sup> mtg, UN Doc A/RES/44/25 (20 November 1989) pt 1 art 1.

<sup>26</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>27</sup> Josephine Tovey, 'Looming crucifixion sparks global calls to spare life of young Saudi Ali Mohammad al-Nimr', *Sydney Morning Herald* (online), 24 September 2015 <[http://www.smh.com.au/world/looming-crucifixion-sparks-global-calls-to-spare-life-of-young-saudi-ali-mohammed-alnimr-20150923-gitlhc.html?&utm\\_source=facebook&utm\\_medium=cpc&utm\\_campaign=social&eid=socialn%3Afac-14omn0012-optim-nnn%3Apaid-25062014-social\\_traffic-all-postprom-nnn-smh-o&campaign\\_code=nocode&promote\\_channel=social\\_facebook](http://www.smh.com.au/world/looming-crucifixion-sparks-global-calls-to-spare-life-of-young-saudi-ali-mohammed-alnimr-20150923-gitlhc.html?&utm_source=facebook&utm_medium=cpc&utm_campaign=social&eid=socialn%3Afac-14omn0012-optim-nnn%3Apaid-25062014-social_traffic-all-postprom-nnn-smh-o&campaign_code=nocode&promote_channel=social_facebook)>.

<sup>28</sup> Radio 3AW, 'Interview with Prime Minister John Howard', *Neil Mitchell*, 8 August 2003 (John Howard).

<sup>29</sup> Colman Lynch, 'Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case' (2008-2009) *Columbia Human Rights Law Review* 523, 559.

row prisoners have been set free since 1975.<sup>30</sup> Advocates for the death penalty must be challenged to consider whether the inevitable killing of innocent people through the execution of capital punishment is justified, in order to maintain the practice as an option for any criminal justice system.

Australia's criminal justice system is motivated in part by the goal of deterrence, and deterrence is often cited by retentionist states as a key aim of capital punishment. However, it has not been established that capital punishment is any more effective a deterrent to serious criminal offending than life imprisonment.<sup>31</sup> Indeed, in some cases, notably for contemporary terrorist offenders, the likelihood of the death penalty being imposed against them can actually motivate offending. Bali bombers Amrozi, Mukhlas and Imam Saumudra were quoted as saying that they dearly wished for martyrdom, and they welcomed their death sentences in court.<sup>32</sup> This mentality reflects a yearning for a sense of power and fulfilment through absolute dedication, commitment, self-sacrifice and the infliction of pain and death.<sup>33</sup> Australia ought to leverage research in this area to build persuasive arguments against capital punishment globally.

### *Managing bi-lateral relationships in response to crimes punishable by death*

Some commentators have argued that Australia has been complicit in the use of the death penalty in its bilateral relationships when dealing with international crime.<sup>34</sup> The involvement of the Australian Federal Police ('AFP') in providing information to Indonesian authorities, which led to the arrest of the Bali Nine members, is relevant in this context. As Ronli Sifris noted, the AFP could have waited until the suspects committed the actual act of drug trafficking on Australian soil and then sought to try them in accordance with Australian laws and without the possibility of capital punishment being

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<sup>30</sup> David Von Drehle, 'Bungled executions. Backlogged courts. And three more reasons the modern death penalty is A Failed Experiment' (2015) 185(21) *Time* 26, 30.

<sup>31</sup> Salil Shetty, 'The Value of International Standards in the Campaign for the Abolition of the Death Penalty' (2014) XXI (1) *The Brown Journal of World Affairs*, 41, 48-49.

<sup>32</sup> 'Opposition to the death penalty is a moral absolute', *Sydney Morning Herald* (online), 6 March 2015 <<http://www.smh.com.au/comment/smh-editorial/opposition-to-the-death-penalty-is-a-moral-absolute-20150305-13vmjf.html>>.

<sup>33</sup> N, Friedland, 'Becoming a Terrorist: Social and Individual Antecedents' in L. Howard (ed), *Terrorism: Roots, Impacts, Responses* (New York, Praeger, 1992) 81-93.

<sup>34</sup> See, eg, Ronli Sifris, 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine', (2007) 35 *Federal Law Review* 81; Nadia Harrison, 'Extradition of the "Bali Nine": Can and should the risk of capital punishment facing Australians be relevant to extradition decisions?' (2006) 1(4) *International Journal of Punishment and Sentencing* 221; Natalie Klein and Lauren Knapman, 'Australians Sentenced To Death Overseas: Promoting Bilateral Dialogues To Avoid International Law Disputes' (2011) 37(2) *Monash University Law Review* 89.



inflicted.<sup>35</sup> In its international cooperation with law enforcement agencies, Australia is at risk of privileging its bilateral relationships at the expense of enforcing a strong abolitionist stance.<sup>36</sup> Australia also risks accusations of hypocrisy in cases where its agencies provide intelligence that may lead to a death sentence against Australian nationals, while simultaneously advocating for clemency for its nationals. What remains clear is that in an era where international cooperation is vital, Australia needs to ensure that our mutual assistance arrangements reflect our commitment to abolishing the death penalty on a global scale, consistent with the *Second Option Protocol*.

Section 8(1)(bf) of the Australian Federal Police Act 1979 (Cth) provides that the functions of the AFP encompass providing assistance to and cooperating with foreign law enforcement, intelligence and security agencies. The significance of this legislation can be seen in the Ministerial Direction issued on 31 August 2004, requiring the AFP 'to be active in pursuing opportunities for cooperation and strategic alliances with Commonwealth, State, Territory and international partners in law enforcement, to support effective action against multi-jurisdictional crime'.<sup>37</sup>

Nevertheless, Australia has entered into several treaties with individual countries with a specific purpose of outlining how and in what situations mutual assistance will be provided regarding criminal matters. The *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters*, enforced from 17 July 1999, states that '[a]ssistance may be refused if... the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty may be imposed or carried out.' It is apparent Australia is able to maintain international and bi-lateral relationships while still advocating against the death penalty, and preventing its use against people in a number of situations.<sup>38</sup>

### *Extending public advocacy beyond situations where Australian nationals face execution*

A broader-scale advocacy effort would enhance Australia's perceived legitimacy on this issue. Australia could follow the lead of the UK in developing a foreign affairs public strategy aiming at

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<sup>35</sup> Ronli Sifris, 'Balancing Abolition and Cooperation on the World Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81, 84.

<sup>36</sup> See Natalie Klein and Lauren Knapman, 'Australians Sentenced To Death Overseas: Promoting Bilateral Dialogues To Avoid International Law Disputes' (2011) 37(2) *Monash University Law Review* 89, 110; Ronli Sifris, 'Balancing Abolition and Cooperation on the World Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81, 107.

<sup>37</sup> Chris Ellison, 'AFP: Ministerial Arrangements' (Ministerial Direction, 31 August 2004) 2.

<sup>38</sup> *Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters*, signed 27 October 1995 (entered into force 17 July 1999) art 4(2)(d).



universal abolition.<sup>39</sup> Such a strategy already has a very strong grounding in Australian law relating to the death penalty. In future lobbying efforts, with the support of a comprehensive policy and strategy, Australia could become a more consistent and principled opponent of capital punishment globally.

Further, if Australia lobbies key allies like China and the United States against capital punishment, then specific advocacy efforts may be less likely to be received as attacks on the state in question. Australia's recent action against Japan before the International Court of Justice, in the *Whaling Case*, demonstrates well that strong and positive bi-lateral relationships may be maintained even while one government seeks to persuade its ally to make a dramatic change to its policy.

## Conclusion

At times, Australia has given stronger or weaker signals about capital punishment depending on political factors. For example, when death sentences were handed down to two of the Bali bombers in 2003, the then Prime Minister John Howard refused to approach the Indonesian Government and ask it to reconsider the penalties. He stated that 'I'm not going to do that because I do respect the judicial processes of Indonesia'.<sup>40</sup> Then opposition leader Simon Crean similarly stated that 'the fact is [Amrozi] committed a crime on Indonesian soil and he faced justice under the Indonesian judicial system. I'm not quibbling with their decision.'<sup>41</sup> Such statements responded to outrage over the Bali bombings among the Australian electorate. In some other cases, official responses to death sentences have been predicated in part on where the sentence has been imposed, the crime subject to the punishment and the level of perceived public sympathy for the person(s) convicted.

Such actions on the part of the Australian government are inconsistent with the position Australia has taken on capital punishment in its domestic law, which confirms Australia's commitment to the abolitionist movement. To effectively advocate for abolition, Australia must oppose the practice of capital punishment in all circumstances, not only in cases involving Australian nationals. Australian officials ought to refrain from 'welcoming the possibility of the death penalty for those who are

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<sup>39</sup> In May 2015, several Australian human rights organisations recommended that the Department of Foreign Affairs develop a new public strategy document aiming at universal abolition of capital punishment: Amnesty International, Human Rights Watch, the Human Rights Law Centre, Reprieve Australia, Australians Detained Abroad, Civil Liberties Australia, the NSW Council of Civil Liberties and UnitingJustice Australia, 'Australian Government and the Death Penalty: A Way Forward' (2015)

<[http://www.amnesty.org.au/resources/activist/Death\\_Penalty\\_-\\_A\\_Way\\_Forward.pdf](http://www.amnesty.org.au/resources/activist/Death_Penalty_-_A_Way_Forward.pdf)>.

<sup>40</sup> Daniel Hoare, 'Australian Exceptionalism: The Bali Nine and the Future of the Death Penalty' (2007) July, *The Monthly* 20, 23.

<sup>41</sup> Ibid.

viewed with disfavour or contempt by the Australian Government or community.’<sup>42</sup> Australia’s legitimacy as an abolitionist advocate will be greatly enhanced by the adoption of a consistent public position, both domestically and in international relations.

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<sup>42</sup> Byrnes, Andrew, ‘The right to life, the death penalty and human rights law: an international and Australian perspective’ (2007) *University of New South Wales Faculty of Law Research Series* 66.