

ABOLITIONIST OR RELATIVIST? : AUSTRALIA'S LEGISLATIVE AND INTERNATIONAL RESPONSES TO ITS INTERNATIONAL HUMAN RIGHTS DEATH PENALTY ABOLITION OBLIGATIONS

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ABSTRACT

The Commonwealth Parliament has enacted human rights amendments to the *Death Penalty Abolition Act 1973* (Cth), extending the existing prohibition against reintroduction of the death penalty to State laws. This legislation is most fully comprehended through examination of several background circumstances, including Australia's international abolitionist position.

A brief consideration is made of the contemporary human rights policy context from which the death penalty abolition extension has emerged, including the Commonwealth Government's response to the *National Human Rights Consultation Report*, and factors reflecting Australia's re-engagement with the United Nations human rights system, including Universal Periodic Review and the bid for a seat on the UN Security Council.

Earlier Commonwealth abolition of the death penalty is discussed, and a legal and constitutional analysis made of amendments in relation to states. The reform's importance is highlighted by the context of state based law and order debates in the age of terrorism, with politicians raising the possibility of death sentence re-introduction.

The reform is considered in an international context of Australians sentenced to death overseas and various inconsistencies in Australian international opposition to the death penalty, based on Australian obligations under Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR) and its *Second Optional Protocol*, and the

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disjuncture between legal obligation and practice, according to circumstances.

Finally, the link between domestic legislative implementation and broader international policy objectives is examined through examples of contemporary executive and parliamentary engagement. These institutions provide some recognition of the inconsistencies, but still allow an undermining of Australia's international abolitionist position. The confirmed death sentences and clemency applications for two of the Bali Nine may provide a reflective political moment for a more cogent appraisal of Australia's international abolitionist obligations.

I. INTRODUCTION

In 2010, the Commonwealth Parliament enacted significant human rights legislation in the form of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth), which amended the *Death Penalty Abolition Act 1973* (Cth)¹ and also introduced Division 274 into the *Criminal Code* (Cth).²

The focus of this article is upon amendment of the *Death Penalty Abolition Act 1973* (Cth), which extended the existing prohibition against reintroduction of the death penalty in the Commonwealth and the Territories to the laws of the States. The significance of this amendment is most fully comprehended through consideration of several background circumstances, including the position of the legislation against Australia's international abolitionist position.

Accordingly, the article commences with a brief consideration of the contemporary human rights policy context from which the death penalty abolition extension has emerged, including the Commonwealth Government's response to the *National Human Rights Consultation Report*, and factors reflecting Australia's stated re-engagement with United Nations human rights institutions. The background of the earlier Commonwealth abolition of the death penalty is discussed, with the article proceeding to a legal analysis of the legislated extension of the death penalty abolition measures to the

¹ See *Death Penalty Abolition Act 1973* (Cth) amended by Schedule 2: Amendments relating to the abolition of the death penalty of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009* which comprised a single page, with 6 brief clauses.

² Division 274 – Torture comprises sections 274.1 to 274.7 inclusively of the *Criminal Code* (Cth) and is contained in Schedule 1 – Amendments relating to the offence of torture, including the repeal of the *Crimes (Torture) Act 1988* (Cth).

states. Relevant constitutional issues on this point in relation to the states are then canvassed to explain the drafting and operation of the legislation. The importance of this reform directed towards state legislative capacity is highlighted by a discussion of the context of state based law and order debates in the age of terrorism, including State and Federal politicians raising the prospect of a re-introduction of the death penalty.

The reform is also considered in an international context of Australians sentenced to death overseas and inconsistencies in Australian international opposition to the death penalty, including interpretation and implementation of Australia's international human rights obligations. This involves the actual implementation of Australia's international human rights obligations under Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)* and the *Second Optional Protocol to the ICCPR*³ - in particular, the extent of Australian obligations, *reflected in policy, as applying externally to Australia*. However, the formal legislative development is not replicated in a consistent and cogent manner in Australian government policy promoting those death penalty abolition obligations internationally.

Finally, the link between domestic legislative implementation and broader international policy objectives is examined through examples of contemporary executive and parliamentary engagement and responses on this point, which, whilst providing some recognition of the inconsistencies, still allow Australia's international abolitionist position to be undermined. The circumstances of the two remaining Bali Nine facing the death penalty may provide a reflective political moment for a more comprehensive and cogent realisation of Australia's international abolitionist obligations.

The common aspect that emerges from each of the following sections is that the recent Australian abolitionist position regarding the death penalty fits within an expressed renewal of commitment to the United Nations human rights system and its instruments, but with an exclusion of an enhanced domestic judicial role in the exposition of such rights. Moreover, practical support for and realisation of that abolitionist position, through executive policy determination, is at times compromised in response to domestic political perceptions and

³ The full title is *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming At The Abolition of the Death Penalty* opened for signature 15 December 1989 1642 UNTS 414 (entered into force 11 July 1991)(*Second Optional Protocol*).

international co-operative realities over matters such as terrorism. In turn, the inconsistencies and relativities apparent in Australia's abolitionist position arguably weaken Australia's moral and legal advocacy claims for Australians sentenced to the death penalty overseas.

II. THE AUSTRALIAN NATIONAL AND INTERNATIONAL HUMAN RIGHTS POLICY CONTEXT OF THE EXTENDED DEATH PENALTY PROHIBITION

The Commonwealth reform to extend prohibition of the death penalty to the states is more accurately comprehended within the context of various announced changes to human rights policy at a national and an international level. The extension of the death penalty abolition reform to the states can be seen as responsive to and reflective of these influences, and ultimately as part of a wider executive commitment to re-engagement with United Nations human rights institutions and instruments.

The issue of extending the death penalty prohibition to the states can first be considered in the context of the legislative and policy response to the Brennan Committee report, the *National Human Rights Consultation Committee Report*.⁴ The Brennan Committee report was released on 8 October 2009, therefore preceding the passage of the instant legislation, although the formal Australian government response to the Brennan Committee report followed the legislation's enactment. In adopting a decidedly minimalist response to the Brennan Committee report, the Australian government rejected the recommendation that Australia adopt a federal Human Rights Act, positioning that response within the *National Human Rights Consultation Report* recommendation that 'the Federal Government develop a national plan to implement a comprehensive framework'.⁵ The launch of Australia's Human Rights Framework⁶ provided the opportunity for announcing that only very limited and selected aspects of the *National Human Rights Consultation Report* would be adopted, and in a manner that overtly favoured parliamentary practices and parliamentary sovereignty over judicial involvement.

⁴ *National Human Rights Consultation Report* September 2009 Commonwealth of Australia

⁵ *Ibid*, xxix, Recommendation 2.

⁶ Robert McClelland, 'Address to the National Press Club of Australia - Launch of Australia's Human Rights Framework' (Speech delivered at National Press Club, Canberra, 21 April 2010)

<http://www.attorneygeneral.gov.au/Speeches/Pages/2010/21April2010AddressstotheNationalPressClubofAustraliaLaunchofAustralia'sHumanRightsFramework.aspx>.

Of particular significance in this limited and selected aspect was an acknowledgment of the obligations under seven core United Nations international human rights treaties to which Australia is a party.⁷ Two measures from the *National Human Rights Consultation Report* were adopted, namely a Parliamentary Joint Committee on Human Rights, and the requirement of Ministers, when introducing a Bill into Parliament to present a statement of human rights compatibility, would be performed against these treaties.⁸ Three other key commitments in the Human Rights Framework⁹ also studiously avoided any further judicial involvement in expounding human rights. This clear emphasis upon parliamentary sovereignty and a Parliamentary based assessment of Australia's international human rights obligations, for instance, foreclosed the type of direct judicial interpretive development that would flow from a statutory charter of rights, including, on the present topic, the right to life.¹⁰ In excluding a judicial interpretive role through a statutory charter of rights, including a relevant interpretive role for present purposes over a right to life, the

⁷ Namely, the *International Covenant on Civil and Political Rights* opened for signature 19 December 1966 999 UNTS 171 (entered into force 23 March 1976) (ICCPR); the *International Covenant on Economic, Social and Cultural Rights* opened for signature 19 December 1966 993 UNTS 3 (entered into force 3 January 1976), the *Convention for the Elimination of All Forms of Racial Discrimination* opened for signature 7 March 1966 660 UNTS 195 (entered into force 4 January 1969), the *Convention for the Elimination of Discrimination Against Women* opened for signature 1 March 1980 1249 UNTS 13 (entered into force 3 September 1981), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* opened for signature 10 December 1984 1465 UNTS 85 (entered into force 26 June 1987), the *Convention on the Rights of the Child* opened for signature 20 November 1969 1577 UNTS 3 (entered into force 2 September 1990) and the *Convention on the Rights of Persons with Disabilities* opened for signature 30 March 2007 2515 UNTS 3 (entered into force 3 May 2008).

⁸ Legislation was introduced to establish a Parliamentary Joint Committee on Human Rights and to require Statements of Compatibility assessing whether a bill introduced into the Commonwealth Parliament is compatible with human rights – see respectively Part 2 and Part 3 of the *Human Rights (Parliamentary Scrutiny) Bill 2010* (Cth). The bill finally passed the Parliament on 25 November 2011, was assented to on 9 December 2011 and came into operation on 4 January 2012: see *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

⁹ Namely an investment of \$12 million in a comprehensive suite of education initiatives, combining federal anti-discrimination laws into a single Act and creating an annual NGO Human Rights Forum to enable comprehensive engagement with non government organisations on human rights matters: 'Address To The National Press Club of Australia – Launch of Australia's Human Rights Framework,' above n 6.

¹⁰ See *National Human Rights Consultation Report*, above n 4, xxxv, Recommendation 24 'The Committee recommends that the following non derogable civil and political rights be included in any federal Human Rights Act, without limitation: The right to life. Every person has the right to life. No one shall be arbitrarily deprived of life. The death penalty may not be imposed for any offence'. In any event, the *National Human Rights Consultation Report* envisaged that a Federal Human Rights Act would only apply to Commonwealth public authorities: *Ibid*, xxxviii, Recommendation 30.

National Human Rights Framework considers that parliamentary and executive action is the designated method of Australian human rights implementation. It is important to see the extension of death penalty abolition legislation to the states as squarely within that parliamentary/executive model, but also enabling the government to present itself as responding positively to international human rights obligations.

Equally, the death penalty abolition extension should also be seen as enacted within the context of the Rudd and Gillard government's desired renewal of Australia's relationship with the United Nations and its human rights institutions. In formal terms, this combines purposes such as re-engagement with United Nations human rights institutions¹¹ and adoption of other formal human rights mechanisms,¹² intended to differentiate the present government's international human rights based policies from those of its predecessor, the Howard government. Extending the abolition of the death penalty to the states can logically be presented by the government as a

¹¹ Robert McClelland, 'Australia and International Human Rights: Coming in from the Cold' (Speech delivered at Human Rights and Equal Opportunity Commission, Sydney, 23 May 2008) <http://www.attorneygeneral.gov.au/Speeches/Pages/2008/Secondquarter/23May2008HumanRightsandEqualOpportunityCommission.aspx>>. Robert McClelland, 'Human Rights under a Rudd Labor Government - What will be different?' (Speech delivered to Banks/Barton FEC Regional Forum, Sydney, 17 November 2008) <http://www.attorneygeneral.gov.au/Speeches/Pages/2008/Fourthquarter/17November2008HumanRightsUnderaRuddLaborGovernmentWhatwillbedifferent.aspx>>. Robert McClelland, Attorney-General (Cth) 'Invitation to United Nations Human Rights Experts' (A-G's Media release 7 August 2008) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2008/Thirdquarter/7August2008InvitationtoUnitedNationshumanrightsexperts.aspx>>. Kevin Rudd, 'Australia's Engagement in Improving Global Human Rights' (Speech delivered to Australian Government NGO Forum on Human Rights, Parliament House, Canberra 22 June 2011) < http://www.foreignminister.gov.au/speeches/2011/kr_sp_110622.html >. The relevant institutional re-engagement included becoming a party to a number of key international instruments opposed by the Howard government, and an open invitation issued to Special Rapporteurs and Working Groups under the auspices of the Human Rights Council to visit Australia. Subsequent re-engagement is also seen in Australia's participation in and responses to Universal Periodic Review, before the UN Human Rights Council.

¹² These activities include ratifying the *Convention on the Rights of Persons with Disabilities* and acceding to the Optional Protocol to the *Convention on the Rights of Persons with Disabilities*; acceding to the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination Against Women* and signing the Optional Protocol to the *Convention Against Torture*.

comprehensive fulfillment of Australia's obligations, within a federal system, under Article 6 of the ICCPR and the *Second Optional Protocol*.¹³

Of particular recent significance in engagement with United Nations human rights institutions was Australia's Universal Periodic Review before the Human Rights Council in the first half of 2011. The Australian government's engagement with the Human Rights Council was highlighted by particular commitments and undertakings raised during the review process, in the opening statement¹⁴ and in the closing remarks.¹⁵ These measures were raised in addition to the content of Australia's report¹⁶ for Universal Periodic Review which includes commentary upon Australian government action in relation to death penalty issues.¹⁷ The inclusion of this material in the Australian report under the heading of 'Right to life, liberty and security of the

¹³ See Robert McClelland, Attorney-General (Cth) 'Passage of Legislation to Prohibit Torture and the Death Penalty' (A-G's media release 11 March 2010) <<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2010/Firstquarter/11March2010PassageofLegislationtoProhibitTortureandtheDeathPenalty.aspx>>. 'This amendment will safeguard Australia's ongoing compliance with the Second Optional Protocol to the International Covenant on Civil and Political Rights, which requires all necessary measures be taken to ensure that no one is subject to the death penalty'.

¹⁴ These new commitments were the establishment of a full time Race Discrimination Commissioner in the Australian Human Rights Commission; the tabling in Parliament of concluding observations made by UN treaty bodies to Australia, as well as recommendations made to Australia in the UPR; establishing a systematic process for the regular review of Australia's reservations to international human rights treaties; and providing a contribution of \$2.35 million to the UN Office of High Commissioner for Human Rights in 2011 to help promote and protect human rights, particularly in the Asia Pacific region: Kate Lundy 'Opening and closing remarks at the United Nations Human Rights Council for Universal Periodic Review 28 January 2011' (Speeches delivered to UN Human Rights Council UPR Review Panel, Geneva, 28 January 2011) <<http://www.attorneygeneral.gov.au/Speeches/Pages/2011/First%20Quarter/28January2011OpeningandclosingremarksattheUnitedNationsHumanRightsCouncilfortheUniversalPeriodicReview.aspx>>.

¹⁵ These further commitments were that the government 'intends to consult extensively with the Australian Human Rights Commission and non government organisations, reflecting on the UPR process and considering how recommendations can best be addressed'; 'to establish a publicly accessible, online database of recommendations from the UN human rights system, including recommendations made by UN human rights treaty bodies to Australia as well as recommendations made to Australia in the UPR'; and 'the Australian Government will use the recommendations made during UPR and accepted by Australia to inform the development of Australia's new National Human Rights Action Plan': 'Opening and closing remarks at the United Nations Council for Universal Periodic Review', above n 14.

¹⁶ Human Rights Council, Working Group on Universal Periodic Review Tenth session Geneva 24 January - 4 February 2011 *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Australia (Australia UPR Report)*

¹⁷ Ibid paragraph 101 (discussion of present legislation ensuring 'the death penalty cannot be reintroduced anywhere in Australia') and paragraph 102 ('new policy to govern law enforcement co-operation with countries that apply the death penalty').

person'¹⁸ amongst measures outlining developments covering other civil and political rights, indicates its importance as one of a series of highlights in Australia's first Universal Periodic Review report to the Human Rights Council.

In relation to United Nations institutions, the most significant present factor is Australia's seeking of a non permanent elected seat on the United Nations Security Council. Within this bid, prominence has been given to the human rights related dimensions¹⁹ that Australian elected membership of the Security Council would entail, along with the constructive role that Australian membership would provide.²⁰

Importantly, the subject matter of the death penalty as a recent Australian human rights issue has not been confined by the government as a single dimension issue of legislative abolition being extended to the states. Instead, it is properly contemplated as an executive sponsored human rights issue involving several other features broadly reflective of Australia's abolitionist position. First, in 2007 Australia successfully co-sponsored a General Assembly resolution²¹ calling for an immediate moratorium on executions, which

¹⁸ Ibid. under heading III Promotion and protection of human rights.

¹⁹ See 'Australia's Engagement in Improving Global Human Rights', above n 11: 'A seat on the United Nations Security Council – for which we are a candidate for 2013-14 – will provide Australia with even greater leverage to influence the global debate on human rights – not just in terms of the sanctions but much more broadly to promote the core values and principles to which we are so strongly committed as a nation'; Kevin Rudd 'Australia's foreign policy priorities and our candidature for the UN Security Council' (Speech delivered at National Press Club, Canberra, on 1 June 2011) <http://www.foreignminister.gov.au/speeches/2011/kr_sp_110601.html>. Stephen Smith 'A Modern Australia For a New Era' (Speech delivered to Australian Strategic Policy Institute National Security Dinner, Sydney, 9 April 2008) <http://www.foreignminister.gov.au/speeches/2008/080309_nsd.html> at 1 December 2011.

²⁰ 'A Modern Australia for a New Era', above n 19; 'Australia's foreign policy priorities and our candidature for the UN Security Council' above n 19; 'Australia's Engagement in Improving Global Human Rights' above n 11.

²¹ General Assembly Resolution 62/149 of 18 December 2007 called upon states still maintaining the death penalty (a) To respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984; (b) To provide the Secretary General with information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty; (c) To progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed (d) To establish a moratorium on executions with a view to abolishing the death penalty.

attracted the support of 104 out of 192 member states.²² That resolution was reaffirmed in 2008 in General Assembly resolution 63/168.²³ Second, Australia in 2010 'made representations to all countries – without exception- which carry out the death penalty or which continue to have the death penalty on their statute books'.²⁴ A feature of Australia's representations against the death penalty has been the inclusion of the topic in annual Australia-Vietnam bilateral human rights dialogues.²⁵

Third, in participating in the 8th Session of the Human Rights Council Universal Periodic Review Working Group, Australia called on various states to abolish the death penalty as it applied within their jurisdictions.²⁶ Fourth, Australia continued its long standing practice of full support in seeking executive clemency for Australian nationals convicted abroad of offences carrying the death penalty, when all formal appeal rights had been exhausted.²⁷ The potential undermining

²² See Law Council of Australia Media Release 19 December 2007 'Law Council Supports UN Vote to Halt Executions' < <http://www.lawcouncil.asn.au/media/news-article.cfm?article=B55FFDD6-1E4F-17FA-D23F-4CD50A36AF4E> > . Minister for Foreign Affairs 12 November 2008 'Joint Press Conference with Dr Hassan Wirajuda – Foreign Minister of Indonesia' (Canberra, 12 November 2008) <http://www.foreignminister.gov.au/transcripts/2008/081112_jpc.html>; Minister for Foreign Affairs 'Questions Without Notice – Indonesia: Travel Advice' (Canberra, 10 November 2008) <http://www.foreignminister.gov.au/transcripts/2008/081110_qwn.html> 1 December 2011.

²³General Assembly Resolution 63/168 Moratorium on the use of the death penalty (18 December 2008).

²⁴ 'Australia's Engagement in Improving Global Human Rights', above n 11; Stephen Smith, Minister for Foreign Affairs and Robert McClelland Attorney-General (Cth) 'Australia welcomes Amnesty International report on the death penalty' (Joint Media release, 1 April 2010) <<http://www.foreignminister.gov.au/releases/2010/fa-s100401.html> > at 1 December 2011.

²⁵ See Stephen Smith, Minister for Foreign Affairs and Trade 'Australia-Vietnam Human Rights Dialogue' (Media Release 26 August 2008) <http://www.foreignminister.gov.au/releases/2008/fa-s136_08.html> at 1 December 2011; Alexander Downer, Minister for Foreign Affairs 'Australia-Vietnam Human Rights Dialogue' (Media Release 19 December 2005) <http://www.foreignminister.gov.au/releases/2005/fa159a_05.html> at 1 December 2011.

²⁶ See Stephen Smith, Minister for Foreign Affairs 'Australia's Engagement at the 8th Session of the Human Rights Council Universal Periodic Review Working Group' (Media Release 14 May 2010) < <http://www.foreignminister.gov.au/releases/2010/fa-s100514.html>>. The states were Belarus, Grenada, Guyana, Kenya, Laos and Lesotho.

²⁷ See Minister for Foreign Affairs 'Press conference: Dr Marty Natalegawa, Minister of Foreign Affairs, Republic of Indonesia and The Honourable Kevin Rudd MP, Minister of Foreign Affairs' (Jakarta, 8 July 2011) http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110708a_press_conference.html Prime Minister 'Transcript of joint press conference, Brisbane' (Brisbane, 18 June

of Australia's abolitionist position by inconsistencies in this practice of Australian nationals warranting an application for clemency are canvassed later in the article. Finally, new guidelines²⁸ were released to govern AFP assistance provided to international law enforcement agencies in death penalty cases,²⁹ prompted by the conduct of the AFP leading to the arrest of the Bali Nine by Indonesian authorities.

In summary, this range of Commonwealth executive activity largely demonstrates a consistent and multi-layered opposition to the death penalty, consonant with a renewed expression of commitment to international human rights institutions and documents and their realisation through executive and legislative means. The present legislation extending the abolition of the death penalty to the states is a practical domestic expression of that approach, properly seen within the broader range of initiatives and activities outlined above.

III. EARLIER COMMONWEALTH ABOLITION OF THE DEATH PENALTY FOR THE COMMONWEALTH AND THE TERRITORIES

In 1973, the Commonwealth retrospectively, contemporaneously and prospectively³⁰ abolished the death penalty in relation to Commonwealth and Territory offences and as far as the then powers of the Parliament permitted, in relation to offences under Imperial Acts.³¹

2011) < <http://www.pm.gov.au/press-office/transcript-joint-press-conference-brisbane-0>>.

Minister for Foreign Affairs and Trade 'Joint media conference with Indonesia Foreign Minister Wirajuda' (Jakarta, 11 August 2008) < http://www.foreignminister.gov.au/transcripts/2008/080811_pc.html>.

²⁸ AFP Practical Guide on International Police to Police Assistance in Potential Death Penalty Situations < <http://www.afp.gov.au/about-the-afp/~media/afp/ips-foi-documents/ips/publication-list/OG00014%20-%20International%20police%20to%20police%20assistance%20in%20death%20penalty.ashx>>.

²⁹ See Brendan O'Connor, Minister for Home Affairs and Robert McClelland Attorney General (Cth) 18 December 2009 'International Law Enforcement Cooperation' (Joint Media Release 18 December 2009) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2009/Fourthquarter/18December2009InternationalLawEnforcementCooperation.aspx>. AFP Media Release 'New AFP Guidelines released' (Media Release 18 December 2009) <<http://www.afp.gov.au/media-centre/news/afp/2009/december/new-afp-guidelines-released.aspx>>. See the subsequent discussion in this article under the heading 'Executive reforms for co-operation and assistance arising from the AFP handling of the Bali Nine - movement towards Australia's international abolitionist obligations?'

³⁰ *Death Penalty Abolition Act 1973* (Cth) s 3(4) 'This Act applies in relation to offences committed before, on or after the date of commencement of this Act...'

³¹ *Death Penalty Abolition Act 1973* (Cth) s 3 and s 4.

In place of the penalty of death for these identified offences, it substituted a penalty of life imprisonment.³²

Australia ratified the *Second Optional Protocol* in October 1990. Parties to the *Second Optional Protocol*³³ undertake under Article 1 that:

1. No one within the jurisdiction of a State party to the present Optional Protocol shall be executed
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Importantly, for the issue of state legislative capacity to impose the death penalty for state offences, Article 9 of the *Second Optional Protocol* states that 'The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions'. The *Second Optional Protocol* builds upon existing States parties obligations under Article 6 of the *ICCPR*³⁴ and is informed by General Comment 6 of the Human Rights Committee on Article 6.³⁵

Clearly, the drafting of the 1973 legislation, in its exclusion of the states for constitutional reasons, was overtaken by the new international legal obligations which accrued from 1990 under the *Second Optional Protocol*. Australia's ratification of the *Second Optional Protocol* enabled the constitutional support for legislation abolishing the death penalty to be shifted from the s 51(xxxix) incidental power allowing legislative implementation of matters incidental to other Commonwealth heads of

³² *Death Penalty Abolition Act 1973* (Cth) s 5 'Where by any law in relation to which this Act applies (including a provision that would, but for this Act, have effect by virtue of such a law) it is provided that a person is liable to the punishment of death, the reference to punishment of death shall be read, construed and applied as if the penalty of imprisonment for life were substituted for that punishment.'

³³ For a discussion of the *Second Optional Protocol*, see William Schabas, *The Abolition of the Death Penalty in International Law* 3rd Edition (2002), 174-187.

³⁴ In particular, Article 6(2) states that 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant... This penalty can only be carried out pursuant to a final judgment rendered by a competent court'. Article 6(6) states that 'Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant'.

³⁵ Paragraph 6 of General Comment 6 on Article 6 of the *ICCPR* observes that states are obliged to 'restrict the application of the death penalty to the 'most serious crimes'. The article also refers generally to abolition in terms which strongly suggest (paras. 2(2) and (6)) that abolition is desirable'.

constitutional power,³⁶ as well as the s 122 *Commonwealth Constitution* Territories power, to the now larger scope of the treaty implementation aspect of the s 51(xxix) *Commonwealth Constitution* External Affairs power.

IV. EXTENDING THE COMMONWEALTH PROHIBITION OF THE DEATH PENALTY TO THE STATES: THE LEGISLATIVE CHANGES

The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2009* (Cth)³⁷ has made a number of straightforward changes to extend the Commonwealth and Territory abolition of the death penalty to laws of the States and does so retrospectively, contemporaneously and prospectively.

A new s 6 is enacted, which states that ‘The punishment of death must not be imposed as the penalty for any offence referred to in subsection 3(2) or (3).’ Relevantly, the existing ss 3(2) states that

This Act applies in relation to, and in relation to offences under, the laws of the Commonwealth and of the Territories, and, to the extent to which the powers of the Parliament permit, in relation to, and in relation to offences under, Imperial Acts’.

New ss 3(3) and 3(4) are added by the amending legislation: ss 3(3) states that ‘Section 6 also applies, in relation to offences under, the laws of the States’; whilst ss 3(4) states that ‘This Act applies in relation to offences referred to in subsections (2) and (3) committed before, on or after the commencement of this Act’.

V. COMMONWEALTH CONSTITUTION ISSUES IN EXTENDING THE DEATH PENALTY PROHIBITION TO THE STATES

The legislation’s implementation of the *Second Optional Protocol* also falls squarely within the limits established for domestic treaty implementation under the s 51(xxix) External Affairs power by the High Court of Australia. First there must be an identifiable treaty obligation – that is, the enacting law must prescribe a regime that the treaty has defined with sufficient specificity to direct the general course

³⁶ Being those heads of Commonwealth constitutional power which enable the enactment of criminal offences as within the scope, or incidental to the scope, of the relevant head of power.

³⁷ See Schedule 2 – Amendments relating to the abolition of the death penalty of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2009* (Cth).

of action to be taken by the signatory states - in contrast to aspirational, recommendatory and hortatory statements in treaties.³⁸ Second, a proportionality test is applied in that the enacting measures are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under the Convention.³⁹ The proportionality test applies as the treaty implementation aspect of the s 51 (xxix) external affairs power is considered to be purposive in nature.⁴⁰

Here, the identifiable treaty obligation is Article 1 of the *Second Optional Protocol* – the obligations that no one within the jurisdiction of a State party to the Optional Protocol be executed and that each State party to the *Second Optional Protocol* shall take all necessary measures to abolish the death penalty within its jurisdiction.⁴¹ The inclusion of new subsections 3(3) and 3(4) in the *Death Penalty Abolition Act 1973* (Cth) to include offences under the laws of the states, and with retrospective, contemporaneous and prospective application of the death penalty prohibition, directly implements both the substantive obligation under Article 1(2) of the *Second Optional Protocol* and the jurisdictional obligation under Article 9 of the *Second Optional Protocol*.⁴² The economy and direct language of these sections deriving from the *Second Optional Protocol* indicates that the legislative changes are reasonably capable of being considered as giving effect to Australia's obligations under the *Second Optional Protocol* and Article 6 of the *ICCPR*.

³⁸ *Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (Industrial Relations Case) (1996) 187 CLR 416, 486 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. The requirement of an identifiable treaty obligation was also more recently confirmed by three judges who discussed the s.51 (xxix) External Affairs power issue in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 95, 126-128 per Hayne and Kiefel JJ (esp 127) and (2009) 238 CLR 1, 157-168 per Heydon J (esp 162).

³⁹ *Victoria v Commonwealth* (Industrial Relations Case) (1996) 187 CLR 416, 486-488 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ and *R v Tang* (2008) 237 CLR 1, 21 per Gleeson CJ; Gummow J (at 27), Hayne J (at 54), Heydon J, Crennan J and Kiefel J (at 64) agreed with Gleeson CJ.

⁴⁰ *Cunliffe v Commonwealth* (1994) 182 CLR 272, 322 per Brennan J; *Richardson v Forestry Commission* (1988) 164 CLR 261, 326 per Dawson J; *Victoria v Commonwealth* (Industrial Relations Case) (1996) 187 CLR 416, 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

⁴¹ Article 1, paragraphs (1) and (2) to the *Second Optional Protocol*.

⁴² Namely that "The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions'.

Significantly, this straightforward implementation task⁴³ avoided the more complicated option of seeking a request and consent of power from the states under s 51(xxxviii) of the *Commonwealth Constitution*.⁴⁴ In that sense, the minimalist constitutional approach was both practical and preferred.

Importantly, the legislative extension of the prohibition of the death penalty as applying to state laws constitutionally relies upon the creation of an inconsistency between Commonwealth and State laws under section 109 of the *Commonwealth Constitution*.⁴⁵ It operates on the assumption of a State seeking to impose a penalty of death in relation to an offence under the law of a State, which would then be inconsistent with the new Commonwealth law.⁴⁶

The legislative approach by the Commonwealth clearly relies upon the jurisprudence of the ICCPR First Optional Protocol communication to the UN Human Rights Committee, *Toonen v Australia*,⁴⁷ the subsequent enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth)⁴⁸ and

⁴³ In enacting Schedule 2 of the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2010* (Cth) comprising a single page, as implementing Article 1(2) of the Second Optional Protocol that 'Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction'.

⁴⁴ This alternative (albeit superfluous) basis for Commonwealth enactment of death penalty abolition legislation was the preferred approach of the Howard Government – see discussion of the *Death Penalty Abolition Amendment (Request) Bill 2008* in NSW Council for Civil Liberties *Background Paper Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* (Background Paper 2005/4 2 January 2008 3rd Edition), 22-23 and Appendix 2.

⁴⁵ s 109 of the *Commonwealth Constitution* states 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid'.

⁴⁶ For brief commentary anticipating this point see Michael Kirby 'The High Court and the death penalty: Looking back, looking forward, looking around' (2003) 77 *Australian Law Journal* 811, 818 and Sam Garkawe, 'The Reintroduction of the Death Penalty in Australia? - Political and Legal Considerations' (2000) 24 *Criminal Law Journal* 101, 107-108.

⁴⁷ United Nations Human Rights Committee Communication No 488/1992. The UN Human Rights Committee found that sections 122(a) and (c) and section 123 of the *Criminal Code Act 1924* (Tas), which criminalized sexual contact between consenting adult homosexual males in private, violated Article 17, paragraph 1 of the ICCPR. In that finding of a violation, the author of the communication was entitled to a remedy from the state party under article 2(3) of the ICCPR, which, in the opinion of the Committee, was the repeal of sections 122 (a) and (c) and section 123 of the *Criminal Code Act 1924* (Tas).

⁴⁸ With the Tasmanian government declining to introduce repeal legislation, the Commonwealth Parliament enacted the *Human Rights (Sexual Conduct) Act 1994*, (Cth), being an 'Act to implement Australia's international obligations under Article 17 of the International Covenant on Civil and Political Rights', with section 4 of the Act the operative provision. Section 4 of the Act states:

the High Court of Australia decision in *Croome and Another v State of Tasmania*.⁴⁹ The amendments to the *Death Penalty Abolition Act 1973* (Cth) anticipate (and seek to make inconsistent) any state law imposing the death penalty for nominated offences, contrary to the Commonwealth prohibition.

Accordingly, the judgments in *Croome*⁵⁰ mean that in a range of presently relevant circumstances,⁵¹ that any state law purporting to impose the death sentence in relation to state offences, is amenable to a High Court challenge on the basis of a section 109 inconsistency of the state law with the amended *Death Penalty Abolition Act 1973* (Cth). In other words, within that range of circumstances, a relevant constitutional *matter*⁵² would arise for adjudication under the *Commonwealth Constitution*.

VI. THE DESIRABILITY OF EXTENDING THE COMMONWEALTH PROHIBITION OF THE DEATH PENALTY TO THE STATES: DOMESTIC POLITICS, STATE BASED LAW AND ORDER DEBATES AND THE AGE OF TERRORISM

The reforms as discussed extending the Commonwealth prohibition of the death penalty to the states are highly desirable on several grounds. These are firstly, a consistency of ultimate penalties for similar or identical offences between state, territory and Commonwealth

'Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Convention on Civil and Political Rights; (2) For the purpose of this section, an adult is a person who is 18 years old or more.'

⁴⁹ (1997) 191 CLR 119. In *Croome v Tasmania*, Toonen's partner sought to obtain a declaration that the *Criminal Code Act 1924* (Tas) provisions were inconsistent with the *Human Rights (Sexual Conduct) Act 1994* (Cth). As no criminal charges had been pursued against Croome and Toonen under the relevant sections of the *Criminal Code Act 1924* (Tas), the litigation focused on whether a constitutional 'matter' existed in the instant circumstances. Accordingly, an apparent inconsistency existed between a Commonwealth law and a State law, but there was no factual application of the State law to the plaintiff upon which the High Court could adjudicate. The High Court, in two separate joint judgments, found unanimously that a relevant constitutional *matter* did exist and that the Tasmanian *Criminal Code* provisions were inconsistent with the Commonwealth legislation.

⁵⁰ (1997) 191 CLR 119.

⁵¹ As s 6 of the *Death Penalty Abolition Act 1973* (Cth) states 'The punishment of death must not be imposed as the penalty for any offence referred to in subsection 3(2) or (3)', such imposition arguably includes a legislative imposition as a penalty for *an offence with which persons may be charged, a sentencing imposition upon conviction* for an offence carrying the death penalty, as well as *the actual carrying out of such a sentencing imposition*. Accordingly, the range of circumstances arising from potential s.109 inconsistency creating a justiciable controversy is considerable.

⁵² See s 76(i) of the *Commonwealth Constitution*.

jurisdictions and their offences. Secondly, the legislative reform provides a more substantial constitutional foundation, reliant as it is upon the treaty implementation aspect of the s 51(xxix) External affairs power, for the death penalty prohibition legislation. This reflects both Australia's ratification of the *Second Optional Protocol* in 1990, but also the evolution of interpretation of the treaty implementation aspect of the s 51(xxix) External affairs power in the post 1973,⁵³ commencing with the cases of *Koowarta v Bjelke-Petersen*⁵⁴ in 1982 and *Commonwealth v Tasmania*⁵⁵ in 1983. Thirdly, the obligations under the *Second Optional Protocol* to take all necessary measures to abolish the death penalty within a state's jurisdiction⁵⁶ and that obligations of the *Second Optional Protocol* 'extend to all parts of federal States without limitations or exceptions'⁵⁷ similarly make the reforms highly desirable, following twenty years of legislative inactivity, to ensure conformity with Australia's international obligation.

The legislative extension of the Commonwealth prohibition of the death penalty to the states is also highly desirable for a further significant reason. The reform reflects the reality that the majority application, activity, investigation and prosecution of criminal offences in Australia involve state laws. It is at state level that law and order debates demand increasingly draconian legislative responses and penalties have emerged, and particularly so after the terrorist events of September 11 2001.⁵⁸ Terrorist crimes have been a modern animator of populist debate about reintroduction of the death penalty. These debates indicate that the Commonwealth legislation is both timely and deals with an unlikely, but not impossible, state legislative move towards re-introduction of the death penalty.⁵⁹

The logical conclusion of increasing calls for severe laws and harsher sentencing is a debate – likely to be conducted in populist terms – about the reintroduction of the death penalty for certain categories of offence, including terrorism offences, which shock the public conscience. In orchestrating such a debate as an ultimate law and order

⁵³ The year of the *Death Penalty Abolition Act 1973* (Cth).

⁵⁴ (1982) 153 CLR 168.

⁵⁵ (1983) 158 CLR 1.

⁵⁶ Article 1, paragraph 2 of the *Second Optional Protocol*.

⁵⁷ Article 9 of the *Second Optional Protocol*.

⁵⁸ This is the case even though Part 5.3 Division 100 of the *Criminal Code* (Cth), which comprises terrorism offences, relies in part upon a State referral of power to the Commonwealth under s 51(xxxvii) of the *Commonwealth Constitution*: see s 100.2 and s 100.3 of the *Criminal Code* (Cth).

⁵⁹ In 1985, New South Wales was the last state in Australia to abolish the death penalty for all offences, having abolished the death penalty for murder in 1955.

response, political calculations might note the fact that some surveys suggest considerable public support for reintroduction of the death penalty.⁶⁰

The state of Western Australia⁶¹ provides an apposite and recurrent example as to the desirability of the federal abolitionist legislation – both from the perspectives of the abhorrence of the death penalty itself, and also because debate about suggested reintroduction can be used as an instrument to advance political objectives.⁶²

In 2000, during the lead up to the Western Australian state election, a petition with two and a half thousand signatures was tabled in the Western Australian Parliament, calling for a referendum on re-introduction of the death penalty.⁶³ The then Western Australian Premier, Richard Court, a supporter of capital punishment,⁶⁴ cultivated public debate whilst ambivalently stating that there would not be a referendum before the state election.⁶⁵ Opponents claimed that the

⁶⁰ 'A 2005 Bulletin poll showed most Australians supported capital punishment. The Australian National University's 2007 Electoral Survey found that 44 per cent of people thought the death penalty should be reintroduced ... Australia may not have the death penalty, but a sizeable part of its population supports its return.': Cited in George Williams 'Opinion: 'No death penalty, no shades of grey' *Sydney Morning Herald* 2 March 2010, 11. The *Bills Digest* for the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009* cites conflicting support: '...A poll taken in 1999 indicated that 54 per cent of Australians believed that Australia should have the death penalty at that time...In a more recent poll, taken in August 2009, a clear majority of Australians (64 per cent) said that imprisonment should be the penalty for murder compared to just 23 per cent who said the penalty should be death'.

⁶¹ Western Australia was the second last state to abolish the death penalty in 1984 and the last state, in 1984, to remove the death penalty for murder: See NSW Council for Civil Liberties 'Death Penalty in Australia' (2009) http://www.nswccl.org.au/issues/death_penalty/australia.php>. Western Australia was the last state in which a convicted person – Brenda Hodge – was sentenced to death in Australia, in August 1984: see Brenda Hodge, *Walk On The Remarkable True Story of the last person sentenced to death in Australia* (2005).

⁶² As Western Australia was the only state to raise concerns about Attorney-General McClelland's then proposal to extend the *Death Penalty Abolition Act 1973* (Cth) to the states, previous advocacy of the reintroduction of the death penalty in Western Australia is highly relevant for present purposes. Western Australia also raised concerns about United Nations inspections of detention and custodial facilities following Australia's accession to the Second Optional Protocol to the *Convention Against Torture*.

⁶³ See 'Death penalty debate in WA' *ABC PM Archive* 16 March 2000 and 'WA premier revisits capital punishment issue' *ABC The World Today Archive* 16 March 2000.

⁶⁴ See 'WA premier revisits capital punishment issue' *ibid*, for reference to Richard Court first raising the issue in 1994 during a state by election.

⁶⁵ See 'WA government rules out death penalty poll' *Sydney Morning Herald* 16 March 2000. The article highlights contradictory statements about the intentions and willingness of the WA state government to hold a referendum on the issue coinciding with the state election, citing community and public opinion reasons.

death penalty was raised as a political diversion and distraction from other pressing political issues then facing the Western Australian government.⁶⁶

Subsequently in 2007, the then shadow Western Australian police minister, Rob Johnson,⁶⁷ called for reintroduction of the death penalty, in such instances as mass murders, serial killers and terrorism.⁶⁸ Support for this initiative was derived from responses to a survey conducted in the shadow minister's Western Australian electorate, with 72 per cent of the 300 respondents agreeing that serious crimes such as murder should be punished by death.⁶⁹

These state based death penalty debates were promoted in 2003 with the public contributions of Prime Minister Howard, in the aftermath of the Bali bombing death penalty applied to the convicted terrorist Amrosi, and in the context of the ongoing enactment of Commonwealth terrorism legislation.⁷⁰ Prime Minister Howard's opinions, aired in a radio interview, were ambivalent in relation to the death penalty, whilst identifying it as a state political issue:

See there is a division in our community on the death penalty, many Australians who are as decent and as moderate as I hope both you and I are actually have a different view on the death penalty and perhaps your view and my view is different, I don't know, but I know lots of Australians who believe that a death penalty is appropriate and they are not barbaric, they're not insensitive, they're not vindictive, they're not vengeful, they're people who believe that if you take another's life deliberately then justice requires that your life be taken...

Firstly the criminal law of this country is overwhelmingly administered by state governments and I don't, even if I'm in favour of the death penalty, I couldn't apply the death penalty for example in

⁶⁶ See comments by then opposition leaders Geoff Gallop in 'WA premier revisits capital punishment issue' above n 63 and Kim Beazley in 'WA government rules out death penalty poll', above n 65.

⁶⁷ Johnson is presently Western Australian Police Minister and Emergency Services Minister and Leader of the House in the Legislative Assembly of the Western Australian Parliament.

⁶⁸ See 'Liberal calls for death penalty' *The Sunday Times* 3 August 2007. See also 'Barnett shifts agenda to a better society' *The Australian* 27 February 2010. For earlier comments by Mr Johnson supporting the death penalty see 'Execute killers, says Lib' *The Sunday Times* 16 October 2005.

⁶⁹ *Ibid.*

⁷⁰ Since 2001, over 40 pieces of legislation were passed by the Howard government relating to terrorism: see *Chronology of Legislative and Other Legal Developments since September 11 2001* (Parliamentary Library)

<<http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron>>.

the state of Victoria. You can raise, and this matter can be pursued at a state political level, you say why haven't you got the right? Well that's up to the Victorian Government...if people want to raise it again it would be open for example to the Victorian Opposition, if you have a different view on this matter to promote it as an electoral issue.⁷¹

One interpretation is that these ambivalent comments are a nuanced cultivation of different political constituencies for maximum electoral effect – mixed messages each playing to different community views, suggesting a possible re-introduction but leaving responsibility for debate and legislative implementation to the states. This vindicates the subsequent enactment of the legislation which prevents state reintroduction of the death penalty, therefore forestalling such debate conducted for opportunistic political reasons.

The matter emerged once more in 2010 through similarly ambivalent comments by the Leader of the Opposition, Tony Abbott. Mr Abbott, describing himself as having always been against the death penalty, stated that if he became Prime Minister there would be no plans for its reintroduction, but that if the issue came before Parliament he would ensure it was a conscience vote.⁷² Mr Abbott then surmised about the inadequacy of imprisonment as a punishment for mass terrorist deaths, stating that death might be appropriate.⁷³

The legislation extending abolition of the death penalty to the states is therefore desirable from the practical governance perspective that it removes both the scope for partisan and reactive political debate to prosecutions and convictions for notorious criminal incidents, and for state and federal politicians alike to opportunistically exploit public sentiment and outrage for base motives and to distract public opinion from other inconvenient and unfavourable political issues. In the case of federal politicians, it removes the ability to engage in suggestive, or 'dog-whistle', politicking about the death penalty, in the knowledge

⁷¹ Transcript of the Prime Minister The Hon John Howard Interview with Neil Mitchell, Radio 3AW, Melbourne August 8 2003 attached to article by Margo Kingston 'Howard to the states: capital punishment your call' *Sydney Morning Herald* August 8 2003 <<http://www.smh.com.au/articles/2003/08/08/1060145858623.html>>. See also Cynthia Banham and Robert Wainwright 'PM ignites death penalty furore' *Sydney Morning Herald* 9 August 2003.

⁷² See Paul Toohey 'Tony Abbott says death penalty fitting for terrorists' *Daily Telegraph* 20 February 2010.

⁷³ Ibid. Mr Abbott stated 'Well, you know, what would you do with someone who cold-bloodedly brought about the deaths of hundreds or thousands of innocent people? I mean, what you've got to ask yourself, what punishment would fit that crime? That's when you do start to think that maybe the only appropriate punishment is death': 'Tony Abbott says death penalty fitting for terrorists'.

that a state or states would have primary political responsibility in re-introduction of the death penalty, without the extension to the states of the *Death Penalty Abolition Act 1973* (Cth).

VII. THE INTERNATIONAL CONTEXT OF THE LEGISLATIVE CHANGES:
DIFFERENTIATING AUSTRALIANS SENTENCED TO THE DEATH OVERSEAS
FROM OTHER EXTERNAL IMPOSITIONS OF THE DEATH SENTENCE

The comments referred to by Prime Minister Howard above⁷⁴ were preceded by the then Prime Minister's acknowledgment that the death penalty on the Indonesian convicted Bali bomber terrorist Amrosi was a matter for Indonesian law and that the Australian government would not be making any objections to the death sentence being carried out.⁷⁵

There has been a further lack of a comprehensive and consistent abolitionist approach regarding Australia's international obligations, from the various senior leaders of both major political parties, in other circumstances overseas involving notorious individuals, where Australia has a particular interest from its military and diplomatic actions post September 11, 2001.⁷⁶ The Foreign Minister, Alexander Downer observed in 2006:

The execution of Saddam Hussein is a significant moment in Iraq's history. He has been brought to justice, following a process of fair trial and appeal, something he denied to countless thousands of victims of his regime...No matter what one might think about the death penalty, and the Government of Iraq is aware of the Australian Government's position on capital punishment, we must also respect the right of

⁷⁴ See the comments of Prime Minister Howard in the text, n71, under the heading 'The desirability of extending the Commonwealth prohibition of the death penalty to the States: domestic politics, state based law and order debates and the age of terrorism'.

⁷⁵ See transcript of Prime Minister John Howard interview with Neil Mitchell, August 8 2003, above n 71: 'I intend to deal with the facts and the facts are that the man is an Indonesian citizen, he was tried in accordance with Indonesian law, Indonesian law obliges the imposition of the death penalty, it has been imposed and in those circumstances, I regard it as appropriate and I do not intend, in the name of the Australian people, to ask the Indonesian Government to refrain from the imposition of that penalty'. See also 'Howard Gives Support to Indonesian Death Penalty for Amrozi' (transcript of press conference given by the Prime Minister John Howard, August 7, 2003) < <http://australianpolitics.com/news/2003/08/03-08-07.shtml>>. 'Australians expect Bali bomber executions, says PM' *Brisbane Times* 13 October 2007.

⁷⁶ Such as Osama Bin Laden and Saddam Hussein. Politicians include Prime Minister John Howard and Opposition leaders Simon Crean and Mark Latham. See Lex Lasry 'Australia and the Death Penalty Are we really against it?' (2006) 80 *Law Institute Journal* 58, 60-61; and Daniel Hoare 'Australian Exceptionalism: The Bali Nine and the Future of the Death Penalty' *The Monthly* July 2007, 20, 23.

sovereign states to pass judgment relating to crimes committed against their people, within their jurisdictions.⁷⁷

Similar approaches to the position of Prime Minister Howard have been articulated by senior members of the Labor Party, forming the present government which introduced the amending legislation extending the death penalty prohibition to the states. In the lead up to the 2007 Federal election, the then Leader of the Opposition, Kevin Rudd, distanced himself from comments made by Labor Foreign Affairs spokesman Robert McClelland, who had indicated an intention in government to campaign against the death penalty in South East Asia, including the execution of the Bali bombers.⁷⁸ This was in spite of Mr Rudd's earlier avowal of an absolute opposition to the death penalty.⁷⁹

Likewise, as the Foreign Minister, Mr Rudd focused on the effectiveness and professionalism of United States Special Forces in bringing to justice by killing (rather than arresting, and delivering in custody for charging and prosecuting, either in the United States or before an international tribunal, for crimes against humanity or similar grave offences) Osama Bin Laden in Pakistan in May 2011.⁸⁰

⁷⁷ Alexander Downer, Minister for Foreign Affairs, Execution of Saddam Hussein' (Media Release 30 December 2006) <http://www.foreignminister.gov.au/releases/2006/fa145_06.html>. In contrast, see the comments of Australian Philip Alston as UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 'Tragic Mistakes Made In The Trial and Execution of Saddam Hussein Must Not Be Repeated' (UN Press Release 3 January 2007) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3983&LangID=E>>.

⁷⁸ 'PM slams Rudd over death penalty' *The Age* October 9, 2007, in which Mr Rudd is quoted as stating 'no government that he led would ever make a diplomatic intervention to save the life of a terrorist facing capital punishment' and cited the insensitivity of the McClelland comments as the fifth anniversary of the Bali bombings approached; Law Council of Australia Media Release, 'Law Council laments Leadership Vacuum on the Death Penalty.' (Media Release 9 October 2007) <<http://www.lawcouncil.asn.au/media/news-article.cfm?article=B55FFD0B-1E4F-17FA-D25D-2C78C2EF4981>>.

⁷⁹ 'I believe the death penalty is repugnant at every level and we have a responsibility not just to speak out against it when it applies to Australians, but to argue uncompromisingly that the time has come for the world to put an end to this medieval practice': Robert Macklin *Kevin Rudd The Biography* (2008), 206-207.

⁸⁰ See Minister for Foreign Affairs 'Transcript of remarks after meeting with US Secretary of State Hillary Clinton' (Washington, 2 May 2011) <http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110502_washington_dc.html>. See also Minister for Foreign Affairs Transcript 'Interview with Jason Morrison, Radio 2UE' (Sydney, 3 May 2011) <http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110503_2ue.html>. Minister for Foreign Affairs Transcript 'Interview with Nick McCallum and Justin Smith,

In 2008, the Foreign Minister, Mr Stephen Smith, unabashedly outlined the differentiated characteristics as providing the firm limits of promoting Australia's abolitionist position:

Australia does not have a death penalty and we argue in international forums to countries that do that they should move away from the death penalty. Where we find Australian citizens, as we do in Indonesia, who have been convicted of crimes subject to the death penalty then when all of the legal and judicial processes have exhausted themselves we make pleas for clemency on behalf of Australian citizens to the relevant nation state....When it comes to non-Australian citizens, we make a judgment on a case by case basis as to whether Australia will make representations on their behalf. For example since I became Foreign Minister there was an incident in Iran where Iran was proposing to execute a minor, a child and Australia joined with other nation states in making representations to Iran to desist from that. When it comes to terrorists who have been convicted and are subject to the death penalty, Australia does not as a matter of policy make representations on their behalf. We make representations on behalf of Australian citizens in the manner that I have outlined.⁸¹

Four critical bipartisan factors primarily establish the boundaries of Australia's abolitionist position. These factors are non-Australian nationality, its linkage to the notoriety of the offence for which the death penalty has been imposed, the adverse impact of the offender's actions on Australian nationals or Australian security and strategic interests, as well as anticipated adverse domestic political reaction if the death penalty was opposed.

However, it is obvious that there are significant consequences for tacitly approving the death penalty for foreign nationals who have killed Australian citizens in terrorist outrages, in sharp contrast to seeking clemency in individual cases for Australians convicted abroad for various offences, particularly drug offences, carrying the death penalty. The operative factors mentioned above which set the boundaries of Australia's abolitionist position clearly promote relativity and convenience. The claim for preservation of the lives of convicted Australians in other situations is then undermined by the allegation of a double standard (with potential racially based

Radio 3AW (Sydney, 3 May 2011) <
http://www.foreignminister.gov.au/transcripts/2011/kr_tr_110503_3aw.html>.

⁸¹ 'Joint media conference with Indonesian Foreign Minister Wirajuda', above n 27.

overtone), selective application of human rights principles,⁸² and a heightened sensitivity of Asian death penalty states, to claims of attempted Australian interference with their laws. Australia's international diplomacy in opposing the death penalty is also undermined by having such an inconsistent approach – that is by differentiating the acceptability of the death penalty on the basis of nationality and externality to Australia, rather than by internationally opposing the death penalty as a matter of universal principle.

The two most prominent contemporary examples of Australians sentenced to death for crimes committed abroad raising these concerns are Van Nguyen⁸³ and amongst the Bali Nine,⁸⁴ the individual cases of Scott Rush, Andrew Chan and Myuran Sukumaran, all of whom were sentenced to death. On 10 May 2011, Scott Rush's death sentence was reduced on appeal to the Indonesian Supreme Court to life imprisonment.⁸⁵

Both Andrew Chan⁸⁶ and Myuran Sukumaran⁸⁷ have exhausted all rights of appeal, their death sentences confirmed on judicial review by

⁸² The obligation of States parties to the *Second Optional Protocol* for international advocacy against the death penalty is seen to arise from the statement in the *Second Optional Protocol* preamble, 'Desirous to undertake an international commitment to abolish the death penalty'.

⁸³ Van Nguyen was hanged in Singapore on December 2 2005 after imposition of a mandatory death penalty for importation of 396 grams of heroin intended ultimately for entry to Australia. In relation to the Van Nguyen matter, see Lasry above n 76, 58; David Indemaur 'Changing Attitudes to the Death Penalty: An Australian Perspective' (2006) 17 *Current Issues in Criminal Justice* 444 and Mirko Bagaric 'Lessons to be Learned from the Execution of Van Nguyen' (2005) 1 *International Journal of Punishment and Sentencing* 111.

⁸⁴ These convictions relate to participation in the attempted smuggling into Australia from Bali of 8.3 kilograms of heroin. Five of the Bali Nine were sentenced, either originally or on appeal, to life imprisonment. A sixth member of the Bali Nine had her life imprisonment sentence reduced to 20 years imprisonment on appeal: see 'Keelty's belated Bali lifeline' *The Australian* 7 May 2010, 13 and 'Postcard: Bali Nine' ABC Radio National *Late Night Live* broadcast 12 May 2010 at <<http://www.abc.net.au/rn/latenightlive/stories/2010/2897744.htm>>. See also Ronli Sifris 'Balancing Abolitionism and Cooperation on the World's Scale: The Case of the Bali Nine' (2007) 35 *Federal Law Review* 81, 83.

⁸⁵ See Kevin Rudd, Minister for Foreign Affairs 'Statement of Indulgence – Mr Scott Rush' (Media Release 10 May 2011) <http://www.foreignminister.gov.au/releases/2011/kr_mr_110510.html>. Peter Alford, 'Scott Rush spared death for a life in Bali jail' *The Australian* 12 May 2011.

⁸⁶ See 'Bali Nine ringleader Andrew Chan loses final appeal' *The Australian* 17 June 2011 and 'Bali Nine's Andrew Chan loses final appeal' *The Age* 17 June 2011.

⁸⁷ See 'Bali Nine ringleader Myuran Sukumaran 'calm' after death appeal loss' *The Australian* 7 July 2011 and 'Bali Nine's Sukumaran loses final death appeal' *The Age* 7 July 2011.

the Indonesian Supreme Court, with the only remaining avenue being a grant of clemency by the Indonesian President. Both the Australian Minister for Foreign Affairs and the Prime Minister have indicated that full representations for clemency will be made by them on behalf of the Australian government with the objective of not having the death sentences carried out.⁸⁸

These cases demonstrate several political consequences from Australia's selective and inconsistent death penalty opposition in contrast to its clear *Second Optional Protocol* international obligations. The influence which Australia can exert for Australian citizens abroad in urgent circumstances,⁸⁹ and also in achieving solidarity amongst other abolitionist states,⁹⁰ is potentially diminished by this selective and nuanced approach. It can also be speculated that lack of moral clarity in such inconsistency creates hesitation in advancing effective Australian objections in individual death penalty cases, frequently because economic interests with important Asian states such as Singapore,⁹¹ or co-operative counter-terrorism memoranda with Asian States,⁹² are believed to be potentially affected.

VIII. ADHERING TO AUSTRALIA'S INTERNATIONAL LEGAL OBLIGATIONS AS AN ABOLITIONIST STATE

In the instance of the investigation and prosecution of the Bali terrorist Amrosi, documents obtained by the NSW Council of Civil Liberties indicate that under the mutual assistance legislation,⁹³ the

⁸⁸ See 'Press conference: Dr Marty Natalegawa, Minister of Foreign Affairs, Republic of Indonesia and The Honourable Kevin Rudd MP, Minister of Foreign Affairs', above n 27; 'Transcript of joint press conference, Brisbane', above n 27.

⁸⁹ Lasry, above n 76, 60; Hoare, above n 76, 22, 25.

⁹⁰ Hoare above n 76, 22-23.

⁹¹ See Indemaur, above n 83, 446; Bagaric, above n 83, 112.

⁹² Australia has entered into bilateral memoranda of understanding on terrorism issues with a number of states in the Asia-Pacific. These states are Indonesia, Malaysia, Thailand, The Philippines, Fiji, Cambodia, India, East Timor, Papua New Guinea, Pakistan, Brunei and Afghanistan, as well as a counter-terrorism declaration with the Association of Southeast Asian Nations. See Greg Carne 'Neither Principled nor Pragmatic? International Law, International Terrorism and the Howard Government' (2008) 27 *Australian Year Book of International Law* 11, 33-35.

⁹³ *Mutual Assistance in Criminal Matters Act 1987* (Cth). S.8(1A) of the Act allows the Minister to authorise assistance in death penalty prosecutions in 'special circumstances': 'A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney General is of the opinion, having regard to the *special circumstances of the case*, that the assistance requested should be granted' (emphasis added).

circumstances in which assistance could be rendered to authorities in jurisdictions with the death penalty was significantly expanded.⁹⁴ The basis of this expansion was a controversial, narrow Attorney General's department legal opinion of the extent of Australia's human rights death penalty obligations under the *Second Optional Protocol*:

The obligations under the ICCPR (and therefore also the OP) apply to 'individuals within [Australia's] territory and subject to its jurisdiction. The Department has previously advised that, in its view, the ICCPR and OP do not apply to individuals outside of Australia's territory or not subject to Australia's jurisdiction. In the Bali attacks, the issue of Australia's obligations under the ICCPR and OP do not arise.'⁹⁵

A contrary view, expressed in the briefing paper, was that the Howard government's legal opinion:

...is flawed. It cannot be reconciled with the UN Human Rights Committee's observation that, under the ICCPR and Second Optional Protocol, Australia is obliged to ensure that it exposes no one in any circumstances to the real risk of execution.⁹⁶

This latter view has strong merit, considering relevant Human Rights Committee jurisprudence and commentary.⁹⁷ In *Judge v Canada*,⁹⁸ the Human Rights Committee, in reviewing and revising earlier jurisprudence about obligations under the *ICCPR* in relation to

It is noteworthy that in the case of the Bali Nine, no request was made under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) – see *Rush and Others v Commissioner of Police* (2006) 150 FCR 165, 175 (per Finn J).

⁹⁴ This occurred in 1999, with Justice Minister Vanstone's liberalisation of the interpretation of 'special circumstances' in s.8 (1A) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth): see NSW Council for Civil Liberties briefing paper (4 February 2008) 'Australia and the Death Penalty A guide to confidential documents obtained under FOI', 4 at < <http://www.nswccl.org.au/docs/pdf/dpfoi%20guide.pdf>>. It has been suggested that 'informal requests' are made by foreign states to Australia, so as to avoid triggering the protections of s 8(1A) of the *Mutual Assistance in Criminal Matters Act 1987*: see NSW Council for Civil Liberties briefing paper (4 February 2008), 9.

⁹⁵ NSW Council for Civil Liberties briefing paper (4 February 2008), *ibid*, 9-10, citing an Attorney-General's department 'Talking Point' (18 March 2003) titled 'Has the Prime Minister in his recent comments reversed Australia's long standing opposition to the death penalty?', which contained the government's legal advice.

⁹⁶ *Ibid*.

⁹⁷ See United Nations Human Rights Committee First Optional Protocol Communications ARJ *v Australia* (Communication 692/1996, 6 February 1996); *GT v Australia* (Communication 706/1996, 10 May 1996) and *Judge v Canada* (Communication 829/1998, 7 August 1998); Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd Edition, 2005), 151-153 and Sifris, above n 84, 85.

⁹⁸ Communication No 829/1998, *ibid*.

extradition to states with a death penalty by states parties who have abolished the death penalty, observed that:

Paragraph 1 of Article 6, which states that ‘Every human being has the inherent right to life...’ is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect *in all circumstances*...the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet verified the Second Optional Protocol to the Covenant Aiming at Abolition of the Death Penalty, violated the author’s right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out.⁹⁹

The Human Rights Committee’s earlier views in *G T v Australia*,¹⁰⁰ identified that Article 6 of the ICCPR and the *Second Optional Protocol* are to be read conjointly in the case of abolitionist states:

The Committee observes that article 6, paragraphs 1 and 2 read together, allows the imposition of the death penalty for the most serious crimes, but that the Second Optional Protocol, to which Australia is a party, provides that no one within the jurisdiction of a State party shall be executed and that the State party shall take all necessary measures to abolish the death penalty in its jurisdiction. The provisions of the Second Optional Protocol are to be considered as additional provisions to the Covenant.¹⁰¹

In both *G T v Australia* and in the earlier communication, *ARJ v Australia*,¹⁰² the instant issues regarding extradition were ultimately resolved on the factual assessment that return of a foreign national to the national’s state would not create a real risk of execution.¹⁰³ Overall, the combined obligation arising under Article 6 of the ICCPR and the *Second Optional Protocol* to the ICCPR for *abolitionist states*, such as Australia, is stated by Nowak:

States parties to the 2nd OP are not only under an obligation to abolish capital punishment in their own jurisdiction, but they also have a broader obligation not to contribute to the implementation of capital punishment by other States. Since the OP must be read together with the right to life in Art 6, paragraphs 2, 4, 5 and 6 of Art 6 are no longer applicable to States parties to the 2nd OP. Consequently, the right to life applies in these

⁹⁹ *Ibid*, para 10.4, 10.6 (emphasis added).

¹⁰⁰ *GT v Australia* Communication 706/1996, para 8.3.

¹⁰¹ *Ibid*.

¹⁰² Communication No 692/1996, above n 97.

¹⁰³ *GT v Australia* Communication No 706/1996 para 8.4; *ARJ v Australia* Communication No 692/1996 para 6.12.

countries without any limitation regarding capital punishment, any extradition to a country which implies the real risk for the person concerned to be subjected to the death penalty would amount to a violation of Art 6 (1), in conjunction with Art 1 of the 2nd OP by the extraditing state.¹⁰⁴

Similarly, it is recalled¹⁰⁵ that in *Judge v Canada*, the UN Human Rights Committee had found that those state parties to the ICCPR which had abolished the death penalty are:

...obliged to protect life in all circumstances. This clearly extends beyond non refoulement (non return) obligations in extradition or deportation cases and includes all actions by a State and its agents. This includes, for example, the actions of the Australian Federal Police when cooperating or sharing information with foreign police agencies in retentionist countries.¹⁰⁶

The obligations of abolitionist states therefore significantly derive from a direct focus upon Article 6, paragraph 1 of the ICCPR¹⁰⁷ and the inapplicability to abolitionist states of paragraphs 2, 4, 5 and 6 of Article 6 of the ICCPR once abolition has been enacted by the state party. This approach makes for a coherent reading of Article 1, paragraph 2¹⁰⁸ of the *Second Optional Protocol* as its confining reference 'within its jurisdiction' is expended once abolition is achieved. The pre-eminence of the Article 6 ICCPR obligation and the broad responsibilities for abolitionist states under it is also suggested by three other factors.

First, the preamble to the *Second Optional Protocol* contains two relevant statements supportive of broad abolitionist responsibilities - 'Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable' and 'Desirous to undertake an international commitment to abolish the death penalty'. Second, Article 6 of the *Second Optional Protocol* states that 'The provisions of the present Protocol shall apply as *additional provisions* to the Covenant'.¹⁰⁹ Third,

¹⁰⁴ Nowak, above n 97, 153. See also Sifris, above n 84, 85.

¹⁰⁵ See *Background Paper Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* NSW Council for Civil Liberties Background Paper 2005/4 2 January 2008 (3rd Edition), 12.

¹⁰⁶ *Ibid.*

¹⁰⁷ Namely, that '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'.

¹⁰⁸ Namely, that 'Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction'.

¹⁰⁹ Emphasis added.

consistent with the precedence of Article 6 of the *ICCPR*, the language of the UN Human Rights Committee General Comment 6 on the Article 6 Right to Life takes a purposive and proactive approach to the right to life, including, but not limited to, death penalty issues. General Comment 6 on the Right to life states:

It is a right which should not be interpreted narrowly...the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.¹¹⁰

It is these points which rebut the artificially narrow interpretation of international death penalty obligations arising for abolitionist states under Article 6 of the *ICCPR* and the *Second Optional Protocol* advanced by one commentator,¹¹¹ who gives pre-eminence to the domestic jurisdictional limits upon the Article 1 obligation under the *Second Optional Protocol*.¹¹²

Indeed, the further situation which extended special circumstances warranting Australian assistance to Indonesia in offences carrying the death penalty in the Bali bombing incident involving the deaths of 88 Australians, without a request of an undertaking from Indonesia that no executions occur, indicates pursuit of particular *national* self interest, arguably, at the expense of compromising of Australia's *international* abolitionist obligations under the *Second Optional Protocol*. Australia's abolitionist position, (expressed for example, in the subsequent legislation extending the prohibition to the states), plays well within domestic politics and within international human rights forums. It however neglects a practical, external implementation of plausible obligations consistent with those identified for states parties under Article 6 of the *ICCPR* and the *Second Optional Protocol*, from the jurisprudence of the UN Human Rights Committee. Accordingly, the Australian position has been exceptional and selective in its interpretation of its abolitionist international legal responsibilities,

¹¹⁰ United Nations Human Rights Committee General Comment 6 on the right to life, paragraphs 1 and 5.

¹¹¹ Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 95.

¹¹² *Ibid*, 108-109,110. In doing so, these views are similar to the narrow 2003 Attorney General's department legal opinion cited above. Finlay further argues that it is doubtful the obligations raised by the Human Rights Committee in *Judge v Canada* extend 'beyond the specific factual scenario confronted in that case, namely the removal of an individual facing the death penalty by deportation or extradition'.

suggesting that the interpretation of those international responsibilities has been shaped by populist domestic political considerations, animated by the nationality of offenders and the egregious nature of the crimes committed against Australian nationals.

IX. OTHER INTERNATIONAL ADJUDICATIVE AVENUES FOR AUSTRALIA TO PURSUE AN ABOLITIONIST POSITION

It should at this moment be confirmed that the death penalty is not prohibited in international law, even though there is a trend towards its abolition.¹¹³ A further (theoretical)¹¹⁴ measure that would be available to Australia to pursue its abolitionist position would be to invoke the Article 41 *ICCPR* inter-state complaints mechanism, Australia having declared on 23 January 1993 that it 'recognises the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the aforesaid Convention'.¹¹⁵ The Article 41 procedure may however only be invoked by a state making such a declaration recognising the competence of the Human Rights Committee as against another State which has also made such an Article 41 declaration.¹¹⁶ A total of 46 states,¹¹⁷ including Australia, have made Article 41 declarations. Of these 46 states, a total of 31 states have also adopted the *Second Optional Protocol*.¹¹⁸

Two points of observation arise here in relation to the scope of application of the Article 41 declaration. Firstly, in relation to the *Second Optional Protocol*, the provisions of the *Second Optional Protocol*

¹¹³ Article 6 of the *ICCPR* is made a non-derogable right under Article 4 of the *ICCPR*. Articles 6(2) to 6(5) of the *ICCPR* impose restrictions on the imposition of the death sentence. See also Human Rights Committee General Comment 6 on Article 6, the right to life, paragraph 6: 'While it follows from Article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes...in any event [they] are obliged to restrict the application of the death penalty to 'the most serious crimes'. See also Finlay, above n 111, 111.

¹¹⁴ In that the *ICCPR* Article 41 Inter-State Complaints mechanism has never invoked by any state.

¹¹⁵ Declaration recognizing the competence of the Human Rights Committee under article 41 – Australia 28 January 1993.

¹¹⁶ The inter-state complaints mechanism under the *ICCPR* is set out in Articles 41 to 43 of the *ICCPR* and initially involves the Human Rights Committee, and subsequently 'If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission': Article 42, *ICCPR*.

¹¹⁷ As at December 2011.

¹¹⁸ As at December 2011.

apply as additional provisions to the ICCPR.¹¹⁹ Therefore states having made an Article 41 declaration are amenable as against a state also having made an Article 41 declaration, for obligations under Article 6 of the *ICCPR*, but also for additional obligations if there has been a further adoption of the *Second Optional Protocol*. Secondly, none of the states in which Australians overseas in recent decades have faced the death penalty – Indonesia, Malaysia, Singapore and Vietnam – have made Article 41 declarations. Indeed, only Indonesia¹²⁰ and Vietnam¹²¹ of these states are parties to the *ICCPR*. For practical purposes therefore, this avenue is foreclosed as a likely method of pursuing Australia's abolitionist position. In relation to Indonesia's obligations under Article 6 of the *ICCPR* in the case of the remaining two of the Bali Nine, Andrew Chan and Myuran Sukumaran,¹²² whose death sentences have been confirmed, there is nothing *prima facie* to suggest that compliance by Indonesia with its international law obligations under Articles 6(2) and 6(4) of the *ICCPR* has not been met.

A further avenue of international review in death penalty cases in recent years is worthy of brief comment. This has been in the form of litigation¹²³ involving the United States before the International Court of Justice, where an indication of provisional measures has been sought to prevent the carrying out of a death sentence upon a national of a state making that request, with the ICJ's jurisdiction established on the basis of both states being parties to the *Vienna Convention on Consular Relations*¹²⁴ and the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*.¹²⁵ In the three relevant cases, the state where the death penalty has ultimately been imposed has allegedly not adhered to rights of

¹¹⁹ Article 6 of the *Second Optional Protocol*.

¹²⁰ Indonesia acceded to the *ICCPR* on 26 February 2006. See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

¹²¹ Vietnam acceded to the *ICCPR* on 24 September 1982. See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

¹²² See the preceding discussion under the heading 'The international context of the legislative changes: differentiating Australians sentenced to death overseas from other external impositions of the death sentence'.

¹²³ See *Avena and other Mexican Nationals (Mexico v United States of America)* ICJ 31 March 2004 and subsequently, *Request for Interpretation of the Judgment of 31 March 2004 in the case concerning Avena and other Mexican Nationals (Mexico v United States of America)* ICJ 19 January 2009; *Le Grand (Germany v United States)* ICJ 27 June 2001; *Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States of America)* ICJ 9 April 1998 and 11 November 1998.

¹²⁴ Opened for signature 24 April 1963, 596 *UNTS* 261 (entered into force 19 March 1967).

¹²⁵ Opened for signature 24 April 1963 596 *UNTS* 487 (entered into force 19 March 1967).

consular access accruing to the suspect at the point of arrest and investigation, as required under Article 36 of the *Convention*. However, the four states mentioned previously where Australians have in recent decades been convicted of offences carrying the death penalty, whilst being parties to the *Convention*, are not parties to the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, so this aspect of providing a jurisdictional basis for the seeking of provisional measures from the ICJ for a like case involving an Australian national sentenced to death but from the point of arrest denied consular access would not be available.

X. AUSTRALIA'S INTERNATIONAL ABOLITIONIST OBLIGATIONS IN THE FEDERAL COURT OF AUSTRALIA

The legislative ambivalence of Australia's abolitionist commitment was further highlighted in the Federal Court decision by Finn J on an application by four members of the Bali Nine.¹²⁶ The applicants submitted, *inter alia*, that actions taken by the Australian Federal Police under the powers and functions of s 8 and s 9 of the *Australian Federal Police Act 1979* (Cth), exposing them to the risk of the death penalty in Indonesia, should be read down by the application of other legislative and government obligations and procedures relating to the death penalty.¹²⁷ As Finn J observed:

The international treaties and instrument that have been ratified by Australia and on which the applicants rely¹²⁸ have not as such been incorporated into Australian law by express enactment. The Abolition Act pre-dated Australia's signing up to the Protocol to the ICCPR. Neither the Abolition Act nor the Protocol addresses action taken by Australian public officers or agencies vis-à-vis foreign law enforcement agencies in connection with offences in their jurisdiction which can there attract the death penalty. Neither expressly or impliedly prohibits taking such action eg the provision of information...Neither expressly betrays an intent in relation to such action. The Abolition Act cannot thus properly be used to read down s.8 of the AFP Act. The Protocol only came into effect for Australian purposes years after the

¹²⁶ *Rush and Others v Commissioner of Police* (2005) 130 FCR 165.

¹²⁷ *Ibid.* For commentary on this case, see Paul Harpur 'The Evolving Nature Of the Right To Life: The Impact Of Positive Human Rights Obligations' (2007) 9 *University of Notre Dame Australia Law Review* 95, 98-99 and Case Note - *Rush v Commissioner of Police* (2006) 30(5) *Criminal Law Journal* 314.

¹²⁸ The applicants relied on 'Australia's ratification both of the *International Covenant on Civil and Political Rights* on 13 November 1980 (the ICCPR) and, more importantly for present purposes, of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* 2 October 1990, it coming into force on 11 July 1991': (2006) 130 FCR 165, 178.

enactment of s.8. It provides no contextual aid to the section's interpretation. In any event it imposes no obligation on a contracting party *vis a vis* a non contracting party in respect of the former's dealings with the latter in relation to offences in the latter jurisdiction which can attract the death penalty...It may be possible to discern in Australian legislation, treaties, official guides etc a declared antipathy to the death penalty. That antipathy, though, has not been pursued unqualifiedly in our legislation and guides in relation to dealings with foreign countries in respect of matters which could attract the imposition of the death penalty.¹²⁹

This judgment was handed down prior to the amendments extending the prohibition of enactment of the death penalty to the states, which coincidentally responds to the chronology issue raised by Finn J in between the Abolition Act and the *Second Optional Protocol*. However, the Australian government's National Human Rights Framework, in its rejection both of a federal Human Rights Act domestically implementing *ICCPR* articles¹³⁰ and a judicial interpretive clause¹³¹ that, as far as consistent with Parliament's purpose, legislation be interpreted in a manner consistent with listed *ICCPR* derived international human rights, means that the interpretive approach of Finn J in *Rush* would remain valid if the matter was to arise again. That is, absent an express incorporation of the relevant *ICCPR* derived rights in the legislation, there is no new legislative authority authorising that the powers and functions of the *Australian Federal Police Act 1979* (Cth) be judicially interpreted in a manner consistent with *ICCPR* rights in cases involving possible eventual imposition of the death penalty. Again, the executive decision to exclude an interpretive clause in a human rights charter means that the strength of Australia's international abolitionist position is ultimately weakened.

XI. EXECUTIVE REFORMS FOR CO-OPERATION AND ASSISTANCE ARISING FROM THE AFP HANDLING OF THE BALI NINE CASE – MOVEMENT TOWARDS AUSTRALIA'S INTERNATIONAL ABOLITIONIST OBLIGATIONS?

In the absence of legislative reform to s 8 (1A) and s (1B) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth), under which no application was made to the Attorney General in *Rush and Others v Commissioner of Police*,¹³² the significant reform therefore is the

¹²⁹ (2005) 130 FCR 165, 183-184.

¹³⁰ See *National Human Rights Consultation Report*, above n 4, xxxiv –xxxv, Recommendation 18 and Recommendation 24.

¹³¹ *Ibid*, xxxvii, Recommendation 28.

¹³² *Rush and Others v Commissioner of Police* (2006) 150 FCR 165, 175: 'It is an agreed fact for the purposes of this application that no request has been made by the Indonesian

subsequent set of AFP guidelines¹³³ governing police assistance to and cooperation with overseas law enforcement agencies in countries that may apply the death penalty.¹³⁴

The guidelines require senior AFP management to consider a list of prescribed factors before providing assistance in possible death penalty cases.¹³⁵ The guidelines require Ministerial approval of assistance in any case in which a person has been arrested, detained, charged with or convicted of an offence which carries the death penalty.¹³⁶ Significantly, Ministerial approval has been added as a requirement to the earlier situations of arrest and detention, preceding those of prosecution and conviction.¹³⁷ The guidelines are a clear response to criticisms of the AFP handling of the tip off information provided by the parents of Scott Rush to the AFP,¹³⁸ and the AFP's failure to stop Rush leaving Australia.¹³⁹ Interestingly, by requiring ministerial approval of assistance in possible death penalty cases from an earlier situation, there may be a significant increase in procedural workload issues for the AFP in documenting a case against the criteria and then

Government to the Australian Government or by the Australian Government to the Indonesian Government in relation to any investigation, arrest or prosecution of the persons now known as the Bali Nine under the provisions of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).¹³³ See (2006) 150 FCR 165, 177-178 for the relevant extracts of ss 8(1)(A) and 8(1)(B) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth). These provisions remain unchanged as at 1 December 2011.

¹³³ AFP Practical Guide on International Police to Police Assistance in Potential Death Penalty Situations above n 28.

¹³⁴ 'International Law Enforcement Co-Operation', above n 29.

¹³⁵ The relevant factors to be taken into account are the purpose of providing the information, the likelihood of the foreign country authorities in using the information only for that purpose, the reliability of the information, whether the information is of an exculpatory nature, the nationality, age and personal circumstances of the person involved, the seriousness of the suspected criminal activity, the potential risks to the person, and other persons in not providing the information, the degree of risk to the person in providing the information, including the likelihood of death penalty being imposed, and Australia's interest in promoting and securing cooperation from overseas agencies in combating crime: 'New AFP Guidelines released', above n 29.

¹³⁶ 'International Law Enforcement Cooperation' above n 29; 'New AFP Guidelines released' above n 29.

¹³⁷ Contrast s 8 (1A) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) which mandates refusal of assistance according to the criteria of 'relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country' (italics added). See also Finlay, above n 111, 107, who relies on the earlier September 2006 guidelines covering police to police assistance, which provided 'that prior to a person being charged with an offence that attracts the death penalty [p]olice-to-police assistance can be provided, without reference to the Attorney General or the Minister for Home Affairs, until charges are laid for the offence' (emphasis added).

¹³⁸ Alford, above n 83.

¹³⁹ *Ibid.* 'Keely's belated Bali lifeline' *The Australian* 7 May 2010.

seeking Ministerial approval. The practical implications and problems of increasing compliance obligations in police to police co-operation have been canvassed elsewhere – these include the sheer volume of information exchanged, adverse impacts upon co-operation aimed at preventing and prosecuting the most serious offences, significantly restricting counter-terrorism co-operation with both Indonesia and the United States and overseas police authorities not being authorised to provide an assurance that the death penalty will not be imposed before information can be exchanged.¹⁴⁰ The 2009 guidelines obviously address these issues impacting upon police to police co-operation by the application of the criteria as a senior AFP managerial function, in turn subject to Ministerial decision at the point where a custodial situation emerges. A political judgment has been made therefore, that despite the problems canvassed, tightened guidelines are practical and workable.

However, the 2009 guidelines remain sufficiently adaptable and porous as to continue to undermine Australia's international abolitionist position regarding the death penalty and the exemplary message in international circles of the extension of the *Death Penalty Abolition Act 1973* (Cth) to the states. It can be argued that the guidelines necessarily have to be sufficiently ambivalent to achieve the stated government claim that they 'represent a balanced and responsible approach that provides greater clarity and accountability, while maintaining our commitment to combating transnational crime'.¹⁴¹ The 2009 guidelines again highlight the centrality and importance of executive policy determination and executive discretion in determining the scope and character of Australia's abolitionist credentials. In particular, the listed factors guiding Ministerial approval of co-operation and assistance from an earlier point of investigatory custody in possible death penalty cases leave wide open the application of the differentiated characteristics in Australia's abolitionist position, which were highlighted earlier in this article.¹⁴²

This less than optimal support for Australia's international abolitionist position was highlighted in correspondence from the Law Council of

¹⁴⁰ Finlay, above n 111, 115-116.

¹⁴¹ 'International Law Enforcement Cooperation' above n 29.

¹⁴² See the discussion under the above heading 'The international context of the legislative changes: differentiating Australians sentenced to death overseas from other external impositions of the death penalty'.

Australia to the Attorney General and the Minister for Home Affairs,¹⁴³ stating that

...unfortunately it must also be acknowledged that Australia's leadership and credibility in this area has been undermined in recent years by an inconsistent and equivocal approach to the provision of agency to agency assistance in death penalty cases. In its current form, the new Guide perpetuates rather than remedies this anomaly.¹⁴⁴

Several major criticisms of the guidelines were raised by the Law Council – the lack of a receipt of an undertaking not to impose the death penalty as a precondition to sharing information, the presence of a balancing requirement regarding information provision instead of a tougher principle that information and assistance should only be provided in death penalty cases in exceptional circumstances, the inclusion of criteria such as nationality and circumstances of the suspect as being incompatible with in principle and absolute opposition to the death penalty and so inviting potential criticisms of inconsistency and racism undermining Australia's legitimacy as an advocate for abolition, and the expedient criterion of Australia's interest in promoting and securing cooperation from overseas agencies in combating crime in deciding whether to provide information and assistance.¹⁴⁵

The criticisms of the Law Council are valid in that they highlight in principle and leave open for practical interpretation, factors of expedience and opportunity as relevant in the exercise of various Ministerial discretions in assistance and co-operation in situations attracting the death penalty. The most likely situations where these factors will play out are Australian nationals abroad being investigated, charged, tried and convicted for offences carrying the death penalty within that jurisdiction. It is significant also that rather than amending relevant legislation – both the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Australian Federal Police Act 1979* (Cth) – to incorporate these principles, guidelines have been relied upon – of itself, a statement of qualified commitment to consistency in Australia's international abolitionist position. Again, this approach highlights the centrality of executive policy, determination and executive discretion in shaping a part of the substantive character of

¹⁴³ Law Council Of Australia Letter to Attorney General and to Minister for Home Affairs 'AFP Practical Guide on International Police to Police Assistance In Potential Death Penalty Situations' 29 January 2010.

¹⁴⁴ *Ibid.*, 2.

¹⁴⁵ *Ibid.*

Australia's abolitionist position. In addition, the rejection of a federal Human Rights Act as part of Australia's Human Rights Framework again removes the influence of a judicial interpretive provision requiring that federal legislation – under which the guidelines are ultimately issued – be interpreted in a way that is compatible with the right to life that would be included in a Human Rights Act and as consistent with parliament's purpose in enacting the legislation.

XII. PARLIAMENTARY DEBATE ACKNOWLEDGING THE INTERACTION OF NATIONAL AND INTERNATIONAL ISSUES REGARDING AUSTRALIA'S ABOLITIONIST OBLIGATIONS

The 2010 parliamentary debates preceding passage of the Act (and after the release of the AFP guidelines in December 2009) clearly acknowledged some issues about advocacy against death penalty application and advocacy of death penalty abolition. In doing so, the link between domestic legislative implementation and broader international policy objective was highlighted. These matters may be indicative of some movement towards greater consistency in the interpretation of obligations under the *Second Optional Protocol* and Article 6 of the *ICCPR* in the domestic and international spheres – in other words, a more consistent and coherent appraisal of Australia's abolitionist policy in the international arena, or at least a heightened appreciation of weaknesses in Australia's abolitionist position.

One emphasis from the debates was the fulfillment of Australia's international obligations, including that of taking 'all necessary measures to abolish the death penalty within its jurisdiction'¹⁴⁶ obviously including state jurisdictions, with the *Death Penalty Abolition Act 1973* (Cth) previously applying only to the laws of the Commonwealth and the Territories. This is a point canvassed in the second reading debates:

The ICCPR only permits the death penalty for the 'most serious crimes'. The Second Optional Protocol goes further and requires Australia to take all necessary measures to abolish the death penalty within its jurisdiction and to ensure that no one within its jurisdiction is subject to the death penalty.¹⁴⁷

¹⁴⁶ *Second Optional Protocol* to the ICCPR Article 1(2).

¹⁴⁷ See Commonwealth, *Parliamentary Debates*, House of Representatives 19 November 2009, 4 (Mr McClelland) and Commonwealth, *Parliamentary Debates* Senate 24 February 2010, 82 (Senator Wong). See also Commonwealth, *Parliamentary Debates* Senate 24 February 2010, 1084 (Senator Wong) and Commonwealth *Parliamentary Debates* House of Representatives 22 February 2010, 1358 (Mr McClelland): '...the bill contains important

A variation in debate upon this fulfillment of Australia's international obligations is in the demonstrated opportunity, through implementing the *Second Optional Protocol*, of re-engagement with the United Nations human rights system,¹⁴⁸ as an example of developments more generally canvassed elsewhere.¹⁴⁹

A second aspect that emerges in the debates is the exemplary role that the legislation represents for Australia as advocating the world wide abolition of the death penalty,¹⁵⁰ including issues about death penalty sentences for Australians convicted abroad and the diplomatic representations made on their behalf. In seeking an international leadership role in advocating death penalty abolition, the debates affirm a compelling aspect that Australia's domestic legislative arrangements are *consistent* with the substance of its international human rights stance and its advocacy of death penalty abolition, as well as its diplomatic representations on behalf of Australians convicted abroad.¹⁵¹ Anything less than exemplary implementation of the *Second Optional Protocol* in Australian domestic legislation and in its

measures which demonstrate the government's ongoing commitment to better recognising Australia's international human rights obligations'.

¹⁴⁸ See Commonwealth, *Parliamentary Debates*, House of Representatives 19 November 2009, 4 (Mr McClelland) ...the spirit of engagement with international human rights mechanisms' and Commonwealth, *Parliamentary Debates* House of Representatives 11 February 2010, 1195, (Ms Parke) 'Australia has taken significant steps under this Labor government to re-engage with the international community'.

¹⁴⁹ McClelland, 'Coming in from the Cold' above n 11; 'Invitation to United Nations Human Rights Experts'; McClelland Human Rights under a Rudd Labor Government above n 11.

¹⁵⁰ The Attorney General noted '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': Commonwealth, *Parliamentary Debates*, House of Representatives 19 November 2009, 5. (Mr McClelland).

¹⁵¹ As the Attorney General observed, 'These domestic amendments complement the measures Australia is taking internationally to promote universal abolition of the death penalty. Through our overseas missions, the government is currently making bilateral representations against the death penalty to all countries that may carry out executions or maintain capital punishment as part of their law': Commonwealth, *Parliamentary Debates*, House of Representatives 22 February 2010, 30 and Commonwealth, *Parliamentary Debates*, House of Representatives 22 February 2010, 52 (Mr McClelland) For other contributions on the issue of consistency as strengthening the Australian abolitionist argument generally and in particular circumstances, see Commonwealth, *Parliamentary Debates* House of Representatives 11 February 2010, 1192-1193 (Mr Hayes) and Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 42 (Mr Dreyfus).

diplomatic practice weakens the practical and moral conviction of the Australian abolitionist position¹⁵² and the chances of success of both.

A third aspect emerging in the debates is the perceived function of the Act responding to the potential re-imposition of the death penalty in international responses to terrorism, including strengthening the democratic nature and values of Australian society being protected,¹⁵³ as well as redressing in some way past death penalty related counter-terrorism excesses – both overseas and domestic – which affronted human rights values.¹⁵⁴

XIII. CONCLUSION

The extension of the prohibition on re-introduction of the death penalty to state laws through the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) is a welcome and timely addition to the domestic implementation of Australia's international human rights obligations. It implements, through a prospective s 109 *Commonwealth Constitution* inconsistency of the Commonwealth law against the state law, a barrier against a State reintroduction of the death penalty. That is an important assurance in the context of recurrent state based and federally referenced law and order debates calling for increasingly severe sentences for offenders, particularly in the ongoing response to international terrorism and possible application of state criminal laws. State jurisdictions were previously not included for constitutional reasons in the 1973 legislation prior to Australia's accession to the *Second Optional Protocol* in 1990. That legislative extension to the States implements, after a very long interval, Australia's federal international convention obligations under Article 6 of the *ICCPR* and the *Second Optional Protocol*. It does so in a manner consistent with the contemporary legislative, rather than judicial orientation, of Australia's Human Rights Framework.

The legislative changes also contribute, as one of a varied range of initiatives, to Australia's international credentials as an abolitionist state. Some greater conformity with Australia's international

¹⁵² Cynthia Banham 'Federal law aims to stop death penalty' *Sydney Morning Herald* 14 March 2009 and 'Australia wants to end death penalty' *Sydney Morning Herald* 9 November 2008.

¹⁵³ Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 48 (Ms Rea).

¹⁵⁴ Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 40 (Dr Kelly) and Commonwealth, *Parliamentary Debates* House of Representatives 22 February 2010, 44 (Mr Murphy).

abolitionist obligations has occurred in the time of the Rudd and Gillard governments in the present extension of the abolition provision to the states, inclusion of earlier arrest and investigation criteria in the 2009 AFP Guidelines on international police to police assistance in potential death penalty situations, and in indications from the Foreign Minister and the Prime Minister that representations seeking clemency in relation to the two convicted Bali Nine Australians facing the death penalty will be strongly pursued. There is also greater evidence of the awareness by some parliamentarians from the debates of inconsistencies in Australian death penalty practice and policy as undermining Australia's abolitionist position, in the twin advocacies of persuading retentionist states to abolish the death penalty and in seeking clemency for Australians convicted abroad for death penalty offences.

However, this reform, and the executive responses to the post death sentence circumstances of the Bali bombers and the Bali Nine, raises continuing issues concerning Australia's substantive commitment to the international abolitionist principle. The strong executive policy determination and responses regarding death penalty issues by both the Howard government and by the Rudd/Gillard governments (the latter responding within the further complicating framework of a renewed commitment to UN human rights institutions and instruments) have been shaped and compromised on occasions by international co-operative realities and domestic political perceptions. Whilst some consciousness exists of such inconsistencies and contradictions, the detrimental effect upon Australia's external credibility is not presently perceived to be of sufficient domestic political importance to warrant more concerted efforts to realise closer conformity of all aspects of Australian policy and practice with its international legal obligations.

One possible further avenue for development is an Australian initiative in leading and developing an international coalition in Asia against the death penalty.¹⁵⁵ Such an initiative could draw its membership from those regional states which have ratified or acceded to the *Second Optional Protocol*¹⁵⁶ and those which have abolished the death penalty

¹⁵⁵ See Donald Rothwell 'Australia and the Death Penalty Forum' *Centre for International and Public Law Newsletter* September 2007, 4-5.

¹⁵⁶ These states being Australia (2 October 1990), Nepal (4 March 1998), New Zealand (22 February 1990), The Philippines (20 November 2007) and Timor Leste (18 September 2003).

without such ratification.¹⁵⁷ From an Australian perspective, it would have the advantage of broadening and localising support and advocacy for the abolitionist position within Asian states, whilst strengthening efforts and credibility in the region where Australian offenders abroad are most likely to face death sentences for serious offences.

The credibility gap and its impact upon measures seeking to avert executions may be brought into sharper relief by the forthcoming success or failure of Australian government representations for clemency to the President of Indonesia in the Indonesian Supreme Court affirmed death sentences by firing squad for two of the convicted Bali Nine, Andrew Chan and Myuran Sukumuran. In practical terms, either consequence will offer a political reflective moment to focus in a more comprehensive and cogent manner in realising Australia's international abolitionist obligations under Article 6 of the *ICCPR* and the *Second Optional Protocol*, of which the extended legislative prohibition to the States under the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 1973* (Cth) is merely a part.

¹⁵⁷ Cambodia and Bhutan: see Amnesty International document 'Abolitionist And Retentionist Countries' < <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>>. Under the heading '1. Abolitionist for all crimes'.