

# Law Reform and the Death Penalty

## Consolidating Australia's Commitment to the Abolition of Capital Punishment

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Dignity and justice for all of us

### **About the NSW Council for Civil Liberties**

The New South Wales Council for Civil Liberties ('NSWCCL') is committed to protecting and promoting civil liberties and human rights in Australia.

NSWCCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

NSWCCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

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### **About this publication**

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### **About the *Universal Declaration of Human Rights***



The 10<sup>th</sup> December 2008 is the 60<sup>th</sup> anniversary of the *Universal Declaration of Human Rights*. The UDHR was the first international recognition that all human beings have fundamental rights and freedoms. The Universal Declaration is the most translated document in the world. NSWCCCL celebrates this important anniversary.

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### **Abbreviations**

<b>ACMA</b>	Australian Communications and Media Agency
<b>ADPAN</b>	Anti-Death Penalty Asia Network
<b>AFP</b>	Australian Federal Police
<b>ASIO</b>	Australian Security and Intelligence Organisation
<b>AUSTRAC</b>	Australian Transaction Reports and Analysis Centre
<b>BP</b>	Background Paper
<b>CCPS</b>	Centre for Capital Punishment Studies (Westminster University, London)
<b>Cth</b>	Commonwealth of Australia
<b>DFAT</b>	Department of Foreign Affairs and Trade
<b>ECHR</b>	European Court of Human Rights
<b>HREOC</b>	Human Rights and Equal Opportunity Commission (Australia's NHRI)
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>INP</b>	Indonesian National Police
<b>JSCOT</b>	Joint Standing Committee on Treaties
<b>MOU</b>	memorandum of understanding
<b>NHRI</b>	National Human Rights Institution
<b>NSW</b>	New South Wales
<b>NSWCCL</b>	New South Wales Council for Civil Liberties
<b>OIL</b>	Office of International Law (Attorney-General's Department)
<b>RCMP</b>	Royal Canadian Mounted Police
<b>UDHR</b>	Universal Declaration of Human Rights (1948)
<b>UN</b>	United Nations

## introduction

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1. The year 2008 marks the 60<sup>th</sup> anniversary of the *Universal Declaration of Human Rights*. In the spirit of the Universal Declaration, this document examines practical measures to ensure Australia meets its international human rights obligations with respect to the death penalty.
2. On 18 December 2007, Australia reaffirmed its commitment to the abolition of capital punishment<sup>1</sup> by voting in the UN General Assembly for a resolution calling for a global moratorium on executions.<sup>2</sup> Across the globe, the undisputed trend is towards abolition and the majority of nations have now abolished capital punishment.<sup>3</sup>
3. In 1990, Australia ratified the *Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty*.<sup>4</sup> This human rights treaty commits Australia to ensuring that in all circumstances it executes no one and it exposes no one to the real risk of execution.<sup>5</sup>
4. Over the last few years, several ambiguities and inconsistencies have crept into Australia's strong principled opposition to the death penalty. There has been domestic political support for the execution of foreign military dictators and terrorists.<sup>6</sup> Australian agencies, in particular the Australian Federal Police, have cooperated and assisted in cases that have led to death sentences: the case of the Bali Nine is the most infamous, but by no means the only case. Many of these policies and activities might breach Australia's international obligations with respect to the death penalty.
5. This paper suggests practical ways to consolidate Australia's commitment to abolition. It sets out eleven legislative and policy reforms that will help to ensure that Australia complies with its international obligations:
  1. adopt the Second Optional Protocol into domestic law;
  2. review government legal advice on the death penalty;
  3. amend the AFP Act to confirm the protection of human rights as a core police function;
  4. review Australian foreign assistance law to ensure it conforms to Australia's international obligations;
  5. enact an Agency-to-Agency Assistance Act to provide a legal framework for assistance to foreign agencies;
  6. redraft the AFP death penalty guidelines;
  7. direct how the AFP cooperate and share information across borders;
  8. review foreign assistance treaties and MOU to ensure they conform to Australia's international obligations;
  9. review by DFAT and HREOC of all MOUs signed by the AFP and release them to the public;
  10. amend freedom of information legislation to ensure legal advice to government on human rights obligations is public; and,
  11. take a leading role in our region lobbying for moratoria and abolition.

## 1. adopt the Second Optional Protocol into domestic law

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6. In 1990, Australia ratified the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty*.<sup>7</sup> That human rights treaty does three important things:
  - i. abolishes the death penalty in Australia;
  - ii. obliges Australia to ensure that in all circumstances it will not put anyone at real risk of execution; and,
  - iii. commits Australia to promoting the cause of abolition internationally.
7. The ratification of a treaty does not automatically make it legally binding in Australian law. To make a treaty binding requires special legislation 'adopting' the treaty into domestic law.
8. In 1990, when the Second Optional Protocol was signed, the death penalty had been abolished throughout Australia. No one thought it would be necessary to pass special legislation to ensure that the Second Optional Protocol was adhered to.
9. However, over the last 10 years it has become increasingly obvious that such legislation is necessary. The Second Optional Protocol obliges Australia to take 'all necessary measures' to implement the treaty throughout the nation. There is currently no constitutional impediment to a populist State government reintroducing capital punishment. While a majority of Australians oppose the reintroduction of the death penalty, a sizeable number do not.<sup>8</sup> The current climate of fear surrounding the 'War on Terror' has the potential to increase pressure for reintroduction.
10. The adoption of the Second Optional Protocol into domestic law, binding the States, is a necessary measure under the Protocol and would also serve to protect the human rights of all Australians and to reaffirm Australia's commitment to abolition.
11. Since 2005, a cross-party working group of federal parliamentarians has been working on legislation to adopt the Second Optional Protocol into domestic law. A draft Bill and detailed research paper are available on the NSW Council for Civil Liberties' website.<sup>9</sup>

## **2. review and release government's legal advice**

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12. Over the last decade, there have been significant changes to Australia's position on the death penalty. Many of those changes were based on flawed legal advice from the Office of International Law (OIL) within the Attorney-General's Department. That advice needs to be released to the public and reviewed by legal experts.
13. The legal advice incorrectly states Australia's international obligations with respect to the death penalty. The advice states that Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Second Optional Protocol to the ICCPR* do not apply to individuals outside of Australia's territory or not subject to Australia's jurisdiction.
14. The former Attorney-General refused the request of the NSW Council for Civil Liberties (NSWCCL) to release the government's legal advice. He also refused to provide a list of legal authorities to which the advice refers – NSWCCL suspects this is because the government lawyers did not review any international human rights law.
15. It is not possible to reconcile OIL's advice with the conclusions of the UN Human Rights Committee in the 1997 case of *GT v Australia*. In that case the Committee found that Australia had an obligation under the Second Optional Protocol not to expose anyone in any circumstances to the real risk of execution.<sup>10</sup> In 2003 the UN Committee confirmed that the same obligation arises from the ICCPR itself.<sup>11</sup>
16. It is also difficult to reconcile OIL's advice with the jurisprudence of the European Court on Human Rights (ECHR). In 2004, the ECHR confirmed that, while a State's jurisdiction is primarily territorial, extraterritorial jurisdiction might arise where the State has effective control of foreign territory<sup>12</sup> and where a State's agents have authority and control over individuals (whether lawfully or unlawfully) in a foreign state.<sup>13</sup> The ECHR observed that jurisdiction "cannot be interpreted so as to allow a State party to perpetrate violations of the [European Human Rights Convention] on the territory of another State, which it could not perpetrate on its own territory".<sup>14</sup>
17. The International Court of Justice is also of the view that the ICCPR applies to a nation when it exercises its jurisdiction extraterritorially.<sup>15</sup>
18. The assistance provided in death penalty cases by the AFP over the last few years has been justified pursuant to the government's flawed legal advice. In a case like the Bali Nine, where the AFP actively shared information with Indonesian police, the exercise of jurisdiction is self-evident.<sup>16</sup>
19. The government should release the legal advice for public scrutiny and seek external independent legal advice on this issue.

### **3. amend the AFP Act to recognise human rights**

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20. Over the last few years there has been a lot of criticism of the Australian Federal Police's handling of foreign death penalty cases, particularly the Bali Nine case. Much of the controversy has arisen because AFP policy fails to recognise Australia's human rights obligations.
21. To remedy this, section 8 of the AFP Act should be amended to add a core function to "respect and protect human rights".<sup>17</sup>
22. Increasingly, the enforcement and protection of human rights is being recognised as one of the core functions of policing. This is especially so in the realm of transnational policing, in which law enforcement agencies are increasingly policing international human rights treaties, such as the conventions against people trafficking and child pornography.<sup>18</sup>
23. Surprisingly, the federal Attorney-General's Department is of the view that police are not bound by Australia's human rights obligations under the *International Covenant on Civil and Political Rights* (ICCPR) or *Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty*.<sup>19</sup> The Department argues that those treaties have not been adopted into domestic law and are, therefore, not legally binding.
24. The AFP is of the view that, irrespective of Australia's human rights obligations, it is obliged by Australia's international obligations to cooperate and share information with foreign law enforcement agencies. The AFP points to Australia's treaty obligations under various UN anti-drug and anti-terrorist treaties.<sup>20</sup>
25. However, the UN has made it abundantly clear that human rights must be respected in the "wars" against drugs and terror. In 2002, the UN General Assembly stressed that "respect for all human rights is and must be an essential component of measures taken to address the drug problem".<sup>21</sup> In 2001, the UN General Assembly reaffirmed that "all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards".<sup>22</sup>
26. Other foreign police forces are required to operate in a manner consistent with human rights. In Canada, for example, the Royal Canadian Mounted Police must comply with the constitutional Charter of Rights and Freedoms. The constitution of the International Criminal Police Organisation (Interpol) states that one of the organisation's aims is to promote international police-to-police assistance 'in the spirit of the *Universal Declaration of Human Rights*'.<sup>23</sup>
27. The year 2008 is the 60<sup>th</sup> anniversary of the *Universal Declaration of Human Rights*. In this anniversary year, respect for and the promotion of human rights should be made a core function of the AFP. This will help to ensure that police-to-police assistance complies with all of Australia's international obligations.

## 4. review foreign assistance law

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28. Australian agencies are increasingly cooperating and sharing information with foreign agencies in the fight against transnational crime. There are three ways in which this is done: extradition; mutual legal assistance (to provide evidence for court); and, agency-to-agency assistance (informal non-court matters). This paper refers to these mechanisms as 'foreign assistance'.
29. There are gaps in existing foreign assistance law with respect to Australia's human rights obligations and these need to be addressed.<sup>24</sup> A joint review of foreign assistance law by DFAT and HREOC, with input from stakeholders and civil society, should be set up and report to Parliament.
30. In brief, one gap in existing foreign assistance law is that not all forms of foreign assistance are governed by statute with human rights safeguards and legal remedies. While extradition and mutual legal assistance are governed by legislation, agency-to-agency assistance is not. The next section of this paper details the need for an Agency-to-Agency Assistance Act.
31. Under the Mutual Assistance Act, a request for assistance from another country *must* be refused if it relates to a capital prosecution or punishment *unless* the Attorney-General is satisfied that there are 'special circumstances'.<sup>25</sup> Traditionally, 'special circumstances' only applies when the evidence is exculpatory or a guarantee that no one will be executed is provided. In 2006, it was revealed that a third 'special circumstance' had been created to permit the AFP to gather evidence for death penalty sentence proceedings.<sup>26</sup> This is a clear violation of Australia's international obligations. The tradition definition of 'special circumstances' should be enshrined in foreign assistance legislation.
32. Another gap in foreign assistance law is the credibility and source of foreign guarantees that they will not execute anyone. With respect to extradition, an Australian court cannot review whether a foreign guarantee is iron-clad.<sup>27</sup> All that is required is that a guarantee is sought and provided. With respect to mutual legal assistance, a foreign government can provide 'cogent advice not amounting to a death penalty undertaking but making it clear that there is no reason to expect that the death penalty would be carried out',<sup>28</sup> which falls short of a guarantee. Guarantees are often supplied by foreign prosecutors or Attorneys-General, which raises constitutional issues about whether the guarantees bind foreign courts. Ideally, death penalty guarantees should be provided by the person with the constitutional power to grant clemency in the case. Thus, no matter the judicial outcome, no one will be executed.
33. Another problem with foreign assistance law is the Minister's discretion to provide assistance – even though someone might be executed. In the Mutual Assistance Act, the Minister can decide to provide assistance in pre-charge situations.<sup>29</sup> The Minister also has an overriding discretion to extradite an individual.<sup>30</sup> Parliament should lay down strict boundaries for the exercise of this discretion, essentially in terms that it should only be used in cases of an imminent threat to human life.

## **5. enact an Agency-to-Agency Assistance Act**

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34. Cooperation and information sharing between Australian and foreign agencies, in the fight against international crime, continues to increase. Transnational police-to-police assistance, as in the Bali Nine drug trafficking case, is just one example of cross-border agency-to-agency assistance. Other Australian agencies that provide such informal assistance to foreign agencies include ASIO, AUSTRAC and ACMA.<sup>31</sup>
35. Extradition and mutual legal assistance are governed by statute,<sup>32</sup> have built-in human rights safeguards and provide for judicial oversight and review of decisions.<sup>33</sup> They are sometimes referred to as 'formal assistance'.
36. Agency-to-agency assistance is not governed by statute. There are no statutory human rights safeguards to ensure that assistance is provided in death penalty cases only in exceptional circumstances. There is also no recourse to the courts for a person aggrieved by such assistance, as was demonstrated when members of the Bali Nine took the AFP to court.<sup>34</sup> Agency-to-agency assistance is also known as "informal assistance".
37. To correct this anomaly, a framework Agency-to-Agency Assistance Act should be enacted, providing human rights safeguards and legal remedies and formalising this form of international assistance.
38. An Agency-to-Agency Assistance Act only needs to set out the legal framework for international cooperation, it does not need to micro-manage such assistance. It sets the boundaries for assistance, in which agencies may operate according to their own discretion.
39. The legislation should bind all Australian agencies, including the military. Australia's human rights obligations under the Convention Against Torture and the Second Optional Protocol are non-derogable – even in times of war.<sup>35</sup>
40. An Agency-to-Agency Assistance Act should provide that assistance which has a negative human rights connotation should never be provided to countries that violate human rights.<sup>36</sup> The Act should state that assistance should not be provided if it exposes anyone to the real risk of execution or torture.
41. The Act should include an exception for death penalty situations in which there is an imminent threat to human life. Under such exceptional circumstances, there should be a ministerial discretion to assist. However, Parliament should be informed. This exception should not apply to torture.
42. The Act should stipulate that all information shared with foreign agencies must contain a written caveat restricting its use. Information collected by Australia belongs to Australia and we should maintain control of it.
43. The Act should provide that all agency-to-agency treaties and MOU are subject to the Act. The Act should require that all such treaties and MOU contain an express clause that all cooperation takes place, and all information is shared, on the understanding that no one will be executed or tortured. This also eliminates the need to obtain guarantees on a case-by-case basis.<sup>37</sup>

## 6. redraft the AFP death penalty guidelines

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44. There has been heavy public criticism of the internal guidelines used by the AFP in foreign death penalty cases.<sup>38</sup> The *AFP Practical Guide on International Police-to-Police Assistance in Death Penalty Charge Situations* currently:<sup>39</sup>
  - (i) grant police discretion to cooperate prior to the laying of charges that could lead to the death penalty; and,
  - (ii) allow police, with the permission of the Justice Minister, to continue cooperating after capital charges are laid.
45. The most infamous example of *pre-charge* cooperation is the Bali Nine.
46. In the last few years, the federal Attorney-General has authorised the AFP to assist in *post-charge* death penalty cases on at least three occasions *without requiring any guarantees that no one will be executed*: in Indonesia, Malaysia and Tonga. The case in Indonesia involved the prosecution of the Bali bombers.
47. In Canada, the police (RCMP) must not share information with a country that violates human rights when there could be a 'negative human rights connotation'.<sup>40</sup> Such connotations include torture and capital punishment. No distinction is made between pre- and post-charge situations: the same rule applies in all circumstances.
48. Over the last decade, the AFP death penalty guidelines have come to be used as standard operating procedure. However, according to Mr Duncan Kerr MP, who was Justice Minister when the guidelines were drafted, they were never intended to be standard operating procedure. They were meant to be used only in exceptional circumstances where there is an imminent threat to human life: the 'ticking bomb' scenario.<sup>41</sup>
49. The AFP death penalty guidelines should be modified to ensure that they are not misinterpreted. It should be clear that information may only be provided in all death penalty situations (both pre- and post-charge) when either: there is a guarantee from a competent foreign body that no one will be executed; or, when such cooperation is exculpatory. The only exception should be when there is an imminent threat to human life, and then only with ministerial approval and a report to Parliament.
50. In essence: the guidelines should be used when there is an imminent threat to human life – otherwise the AFP must in all circumstances put no one at real risk of execution. Such a change will ensure that Australia complies with its international human rights obligation not to expose anyone in any circumstances to the real risk of the death penalty.

## **7. direct how the AFP share information**

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51. Cases like the Bali Nine have brought to public attention the work that the Australian Federal Police do overseas. The AFP cooperate and share information with foreign law enforcement agencies on a daily basis. Most of that activity is undertaken at the discretion of police with no judicial or ministerial oversight.
52. The internal operational procedures on how information is shared with foreign agencies have not been released by the AFP. This is in stark contrast to the procedures of Canadian police, which were released during a recent Royal Commission.<sup>42</sup>
53. In Canada, the police (RCMP) can only share information with foreign agencies when a written caveat is attached.<sup>43</sup> The caveat states the purpose for which the shared information may be used. The caveat states that the information must not be passed on to any other agency without RCMP permission. The caveat is not legally binding, but any foreign agency that breaches the caveat risks its reputation as a reliable partner in international law enforcement. The mandatory use of caveats helps to ensure that the RCMP keeps control of the information it shares.
54. While the AFP sometimes places caveats on information shared with foreign agencies, it is not standard operating procedure.<sup>44</sup> This is a serious flaw in the way the AFP conducts police-to-police assistance. The AFP sometimes argue that the sheer volume of requests for assistance from foreign agencies makes it impossible to screen requests.<sup>45</sup> Screening and caveating such requests does not appear to bother other foreign agencies, for example the RCMP which receives more than double the number of international requests for assistance received by the AFP.<sup>46</sup>
55. The Minister should direct the AFP that all information shared across borders contain a written caveat stating that the information:
  - (i) should not be passed to any other agency (international or domestic) without permission of the AFP;
  - (ii) should not be used for any purpose other than the purpose for which it is provided; and,
  - (iii) should not be used in the investigation or prosecution of a capital offence (unless the appropriate foreign officials have guaranteed that no one will be executed).
56. The Minister in charge of the AFP may direct the AFP how to operate and the Commissioner must comply.<sup>47</sup> This is done by way of 'Ministerial Directions'.<sup>48</sup> A direction on caveats in the terms listed above should be issued to the AFP. This will help to ensure that Australia maintains control over the information it has collected and that Australia complies with its international human rights obligations.

## **8. review foreign assistance treaties and MOU**

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57. All foreign assistance treaties and memoranda of understanding should be consistent with foreign assistance legislation. This includes any future agency-to-agency assistance legislation.
58. These treaties and MOU should comply with Australia's obligations in all circumstances not to expose anyone to the real risk of execution. Unfortunately, not all treaties do so comply. For example, recent mutual assistance and extradition treaties with China and Malaysia do not expressly reserve Australia's right to refuse assistance when someone is at real risk of execution.
59. Nor does the Lombok Treaty, Australia's first bilateral treaty dealing with agency-to-agency assistance, explicitly mention Australia's international human rights obligations.<sup>49</sup> The majority JSCOT report found it was 'unnecessary to specifically require a reference' to Australia's human rights obligations in the treaty.<sup>50</sup> This finding is dangerous because it sets a precedent that human rights safeguards do not need to be expressly included in agency-to-agency treaties.
60. A new model for foreign assistance treaties and MOU should be phased in. The new model should require an express clause stating that all assistance under the treaty or MOU is given on the guarantee that no one will be executed or tortured as a result of this assistance. For those treaties and MOU without such an express clause, then a case-by-case guarantee should be provided that no one will be executed or tortured.
61. All of Australia's foreign assistance treaties and MOU should be reviewed by DFAT, HREOC and/or JSCOT to ensure they comply with foreign assistance law and Australia's human rights obligations. The review should report to Parliament.
62. The need for such a review is made more pressing by the admission of the Attorney-General's Department that foreign assistance treaties are negotiated without taking into account the other nation's human rights record.<sup>51</sup> The existence of secret police-to-police MOU, negotiated by the AFP with foreign law enforcement agencies, is another strong reason for such a review.<sup>52</sup>

## **9. review and release all police-to-police MOU**

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63. Over the last decade, the AFP has signed Memoranda of Understanding (MOU) relating to transnational cooperation with foreign law enforcement agencies. These MOU are important in the investigation of transnational criminal activity. Because they are so important, they should be reviewed and made public.
64. The AFP has signed such MOU with the national police forces of Indonesia (1998), China (1999), Thailand (2003), Malaysia (2003), Singapore (2005) and Vietnam (2006) – all of which retain the death penalty.
65. It is more likely than not that these MOU contain no human rights safeguards. While MOU have less than treaty status, because of their international and domestic significance it is appropriate for a review to be undertaken, preferably jointly by HREOC and DFAT, to ensure that existing MOU conform to Australia's human rights obligations.
66. Future MOU should be scrutinised by Parliament, or at the very least by the Department of Foreign Affairs, to ensure that they comply with Australia's human rights obligations. Parliamentary scrutiny could be performed by the Joint Standing Committee on Treaties.
67. The text of these MOU are not publicly available.<sup>53</sup> While no one argues that the details of an ongoing police operation should be disclosed publicly, there is no reason why the 'framework' procedures and rules for all such operations should be treated as a national secret. Their release does not jeopardise any ongoing police operation and the public has a right to know the rules by which its police cooperate with foreign agencies.
68. The release of the text of these MOU will help to reassure the public that the Australian Federal Police are complying with Australia's human rights obligation not to expose anyone in any circumstances to the real risk of execution.

## **10. amend freedom of information legislation**

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69. From material obtained under Freedom of Information legislation, it appears that the Australian government has legal advice to the effect that Australia's international human rights obligations with respect to the death penalty do not extend beyond our borders. All the assistance provided in death penalty cases by the AFP appears to have been justified pursuant to that legal advice.
70. There are three legal advices provided to the Australian government by the Office of International Law within the federal Attorney-General's Department. The first is dated in 1991, around the time that Australia acceded to the Second Optional Protocol. The other two advices are dated 14 November 2002 and 12 December 2002.
71. When NSWCCCL requested a copy of these advices under freedom of information, the Department claimed legal professional privilege. NSWCCCL wrote to the Attorney-General Philip Ruddock and requested that he waive legal professional privilege. Mr Ruddock refused and he also refused our request for a list of legal authorities cited by the advices.
72. In NSWCCCL's view, the legal advice provided to the government is plainly wrong. It does not accord with current jurisprudence.<sup>54</sup> If the advice is made in good faith, it cannot endanger Australia's national security, international relations or operational policing because it simply amounts to Australia's interpretation of its international human rights obligations. The public has a right to know how its government interprets our human rights obligations.
73. NSWCCCL notes that when the FOI Act was introduced by the Fraser government, the Senate recommended that the exception for legal professional privilege be restricted to advice in 'pending or likely legal proceedings'.<sup>55</sup> This recommendation was not adopted by the government. CCL recommends that the Senate's recommendation should be adopted and subsection 42(1) of the FOI Act should be amended accordingly.
74. NSWCCCL also notes that the Brazil Direction<sup>56</sup> directs that 'legal professional privilege should be waived unless some real harm would result from release of the documents'. This Direction should also be adopted into section 42 of the FOI Act.

## **11. lobby for regional moratoria and abolition**

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75. During the 2007 federal election campaign, the Rudd campaign indicated that it would forge a coalition of regional abolitionist powers to lobby regional retentionist powers to abolish capital punishment.<sup>57</sup> This is a positive sign that Australia is taking seriously its obligation under the Second Optional Protocol to encourage the global abolition of capital punishment. The plan is also consistent with Australia's recent vote in the UN General Assembly calling for a global moratorium on executions.<sup>58</sup>
76. In lobbying for moratoria and abolition in our region, the government should consider consulting with the staff of the Centre for Capital Punishment Studies (CCPS).<sup>59</sup> The CCPS is not an advocacy centre. It is a research centre attached to the law faculty of the University of Westminster, London. The CCPS has completed extensive research into capital punishment and the impact of both retention and abolition around the world. The CCPS has undertaken impressive research into the alternatives to capital punishment. Governments across the world consult the CCPS on a regular basis, because of its expertise and reputation. The CCPS would be able to provide important information to assist the Australian government in its efforts to influence the regional debate on capital punishment.
77. In July 2006, Amnesty International was instrumental in establishing the Anti-Death Penalty Asia Network (ADPAN), which brings together human rights advocates from civil society in 19 countries, including Australia, Hong Kong, India, Indonesia, Japan, South Korea, Malaysia, Mongolia, New Zealand, Pakistan, Papua New Guinea, Philippines, Singapore, Taiwan and Thailand.<sup>60</sup> The Australian government should support this initiative with appropriate funding.
78. All efforts made by the Australian government toward the abolition of capital punishment in our region are to be encouraged. Many of the problems in agency-to-agency cooperation will disappear if Asia becomes, like Europe, a capital punishment free zone.

## endnotes

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<sup>1</sup> in Australia, the death penalty was first abolished in Queensland in 1922. In 1973, the federal Parliament abolished the death penalty in federal law. By 1985, capital punishment had been abolished throughout the country: see New South Wales Council for Civil Liberties, *The Death Penalty in Australia and Overseas*, Background Paper 2005/3 (29 March 2005), <[http://www.nswccl.org.au/docs/pdf/bp3\\_2005\\_dp\\_paper.pdf](http://www.nswccl.org.au/docs/pdf/bp3_2005_dp_paper.pdf)>, 8.

<sup>2</sup> UN General Assembly, Resolution A/RES/62/149 (18 December 2007), 104 votes for, 54 against and 29 abstentions; <<http://www.un.org/ga/62/resolutions.shtml>>.

<sup>3</sup> New South Wales Council for Civil Liberties, *The Death Penalty in Australia and Overseas*, Background Paper 2005/3 (29 March 2005), <[http://www.nswccl.org.au/docs/pdf/bp3\\_2005\\_dp\\_paper.pdf](http://www.nswccl.org.au/docs/pdf/bp3_2005_dp_paper.pdf)>, p.8.

<sup>4</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* [1991] ATS 19 (entered into force 11 July 1991), <<http://www.austlii.edu.au/au/other/dfat/treaties/1991/19.htm>>.

<sup>5</sup> "For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application": *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998, [10.4].

<sup>6</sup> Michael Walton, "Australia changes its position on the death penalty" [2003] *Human Rights Defender* 6; available at <[http://www.nswccl.org.au/issues/death\\_penalty/aust\\_policy.php](http://www.nswccl.org.au/issues/death_penalty/aust_policy.php)>.

<sup>7</sup> For a complete discussion of the *Second Optional Protocol*, see: New South Wales Council for Civil Liberties, *Second Optional Protocol*, Background Paper 2005/4 (3<sup>rd</sup> edition, 2 January 2008), <[http://www.nswccl.org.au/docs/pdf/bp4\\_2005\\_2op\\_paper.pdf](http://www.nswccl.org.au/docs/pdf/bp4_2005_2op_paper.pdf)>.

<sup>8</sup> Patrick Carlyon, 'Swinging Voters' *The Bulletin* (Sydney) 1 March 2006. A majority of those polled (48.7% versus 46.5%) believed the death penalty should not be reintroduced in Australia. Curiously, a majority of the same people polled supported capital punishment (49.1% versus 46.8%). See also: NSWCCCL, BP 2005/3, n 1, p.4ff.

<sup>9</sup> NSWCCCL, BP 2005/4, n 7.

<sup>10</sup> *GT v Australia* (1997) UN Doc CCPR/C/61/D/706/1996. See: NSWCCCL, BP 2005/4, n 7, [29]-[30].

<sup>11</sup> *Judge v Canada* (2003) UN Doc CCPR/C/78/D/829/1998. See: NSWCCCL, BP 2005/4, n 7, [31]-[35].

<sup>12</sup> *Issa v Turkey* (2004) 31821/96, [69].

<sup>13</sup> *Issa v Turkey* (2004) 31821/96, [71].

<sup>14</sup> *Issa v Turkey* (2004) 31821/96, [71].

<sup>15</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory - Advisory Opinion* [2004] ICJ 2 (7 July 2004), [108]-[111].

<sup>16</sup> AFP officers exercise power under the *Australian Federal Police Act 1979* (Cth) and the *Crimes Act 1914* (Cth). Bother Acts apply extra-territorially: AFPA s.5A(1) and CA s.3A. These powers are exercised on a foreign territory with the consent of the foreign government. This consent can be on a case-by-case basis or under the terms of an MOU or treaty. For example, the AFP operated with the INP in Indonesia after the Bali Bombings in 2002 under a joint operation "Technical Agreement" (MOU). Thus, the AFP exercises its Australian powers overseas (by consent), which is a clear exercise of Australian jurisdiction (by consent).

<sup>17</sup> the phrases 'respect human rights' and 'protect human rights' are taken from the *UN Charter*. They also appear in Victoria's *Public Administration Act* (2004) s.7(1)(g), which binds Victorian police.

<sup>18</sup> e.g. *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* [2007] ATS 6 (entered into force 8 February 2007); and, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime* [2005] ATS 27 (entered into force 14 October 2005).

<sup>19</sup> Joint Standing Committee on Treaties, *Hansard* (4/9/2006) 13 (evidence of Joanne Blackburn, First Assistant Secretary).

- <sup>20</sup> e.g. Joint Standing Committee on Treaties, *Hansard* (4/9/2006) 2 (evidence of FA Tim Morris, Acting National Manager, International and Border, Australian Federal Police).
- <sup>21</sup> UN General Assembly, *International cooperation against the world drug problem* (24 January 2002) UN Doc. A/RES/56/124.
- <sup>22</sup> UN General Assembly, *Human Rights and Terrorism* (13 February 2002) UN Doc. A/RES/56/160.
- <sup>23</sup> *Constitution of Interpol*, Article 2(1): "Its aims are...To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the *Universal Declaration of Human Rights*".
- <sup>24</sup> The review should also consider Australia's obligations under the Convention against Torture: *Convention against Torture* [1989] ATS 21 (entry into force 7/9/1989).
- <sup>25</sup> *Mutual Assistance in Criminal Matters Act 1987* (Cth) s.8(1A).
- <sup>26</sup> Joint Standing Committee on Treaties, *Hansard* (19/6/2006) 34 (evidence of Joanne Blackburn, First Assistant Secretary): '...where the information to be provided goes to the impact of a crime on the victims'. See also: NSWCCCL, *Shadow Report: Convention Against Torture* (2007) [85], <<http://www.nswcccl.org.au/docs/pdf/CAT%20shadow%20report.pdf>>.
- <sup>27</sup> *McCrea v Minister for Customs & Justice* [2004] FCA 1273 (North J).
- <sup>28</sup> Confidential departmental submission to the Attorney-General, *Bali bombings – Australian involvement in criminal investigation and prosecution* (15 November 2002), [31].
- <sup>29</sup> *Mutual Assistance in Criminal Matters Act 1987* (Cth) s.8(1B).
- <sup>30</sup> *Extradition Act 1988* (Cth) s.22(3)(f). See also: *McCrea v Minister for Customs & Justice* [2004] FCA 1273, [22].
- <sup>31</sup> Attorney-General's Department, *Fact Sheet 2: What is the difference between mutual assistance and police-to-police and agency-to-agency assistance?*, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance\\_Mutualassistance\\_Mutualassistanceandpolice-to-policeassistance](http://www.ag.gov.au/www/agd/agd.nsf/Page/Extraditionandmutualassistance_Mutualassistance_Mutualassistanceandpolice-to-policeassistance)>.
- <sup>32</sup> *Extradition Act 1988* (Cth) and *Mutual Assistance in Criminal Matters Act 1987* (Cth).
- <sup>33</sup> the extradition process includes a hearing before a Magistrate. Decisions made under the mutual assistance Act can be reviewed by a court under the ADJR Act.
- <sup>34</sup> *Rush v Commissioner of Police* [2006] FCA 12 (Finn J).
- <sup>35</sup> *Convention Against Torture* Article 2(2): 'No exceptional circumstances whatsoever, whether a state of war or a threat of war...or any other public emergency, may be invoked as a justification for torture'. *Second Optional Protocol to the ICCPR* Article 6(2) (Australia did not enter a war-time reservation under Article 2 when acceding to the Protocol).
- <sup>36</sup> this is the test used in Canada for police-to-police assistance: see [47].
- <sup>37</sup> police complain that the need to obtain death penalty guarantees adds frustrating delays to the work of obtaining extradition and providing assistance: e.g. Les Kennedy, 'Loophole left three to rot in jail', *Daily Telegraph* (Sydney), 19 April 1997, 19. By including these guarantees at the treaty-level, there is no need to obtain individual guarantees on a case-by-case basis, thus saving valuable police time and resources.
- <sup>38</sup> for a list of criticism, see: NSWCCCL, 'The Australian Federal Police and Capital Punishment', <[http://www.nswcccl.org.au/issues/death\\_penalty/afp.php](http://www.nswcccl.org.au/issues/death_penalty/afp.php)>.
- <sup>39</sup> Australian Federal Police, *Practical Guide on International Police-to-Police Assistance in Death Penalty Charge Situations* (2006), <[http://www.afp.gov.au/data/assets/pdf\\_file/21096/Guideline\\_for\\_international\\_death\\_penalty\\_situation.pdf](http://www.afp.gov.au/data/assets/pdf_file/21096/Guideline_for_international_death_penalty_situation.pdf)>.
- <sup>40</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), 346, <[http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher\\_arar/07-09-13/www.ararcommission.ca/eng/AR\\_English.pdf](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf)>.
- <sup>41</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 August 2006, 145ff (Mr Duncan Kerr MP).
- <sup>42</sup> Arar Commission, *Analysis and Recommendations* (2006) n 40, 345ff.
- <sup>43</sup> Arar Commission, *Analysis and Recommendations* (2006) n 40, 339ff.
- <sup>44</sup> Joint Standing Committee on Treaties, *Hansard* (4/9/2006) 7 (evidence of FA Tim Morris, Acting National Manager, International and Border, Australian Federal Police).

<sup>45</sup> Joint Standing Committee on Treaties, *Hansard* (4/9/2006) 8 (evidence of Federal Agent Morris, AFP Acting National Manager of International and Border): "...generally speaking, we would not refuse a police-to-police request because there was a potential that one of the persons subject to the investigation may be subject to a charge that could attract the death penalty...". See also: Senate Legal and Constitutional Committee, Estimates, *Hansard* (31/10/2005) 167-8 (Mr Mick Keelty, AFP Commissioner); and Senate Legal and Constitutional Committee, Estimates, *Hansard* (17/2/2006) 56-58 (Mr Mick Keelty, AFP Commissioner).

<sup>46</sup> In 2005 the RCMP received "approximately 26,000" international requests for investigative assistance: RCMP, *Departmental Performance Report for the period ending March 31, 2006*, 49 (Table 13), <[http://www.tbs-sct.gc.ca/dpr-rmr/0506/RCMP-GRC/rcmp-grc\\_e.pdf](http://www.tbs-sct.gc.ca/dpr-rmr/0506/RCMP-GRC/rcmp-grc_e.pdf)>. By contrast, the AFP receives approximately 11,000 incoming requests: Senate Legal and Constitutional Committee, Estimates, *Hansard* (17/2/2006) 56 (Mick Keelty, AFP Commissioner).

<sup>47</sup> *Australian Federal Police Act 1979* (Cth) s.37(2).

<sup>48</sup> For most recent direction, see: *Ministerial Direction* (August 2004), <[http://www.afp.gov.au/services/operational\\_priorities/ministerial\\_direction.html](http://www.afp.gov.au/services/operational_priorities/ministerial_direction.html)>.

<sup>49</sup> Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation [2006] ATNIF 25 (not yet in force, as at 14 January 2008), <<http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2006/25.html>>. Also known as the 'Lombok Treaty'.

<sup>50</sup> Joint Standing Committee on Treaties, *Report 84* (Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation, signed at Lombok on 13 November 2006), June 2007, [3.21], <<http://www.aph.gov.au/house/committee/jsct/6december2006/report.htm>>.

<sup>51</sup> Joint Standing Committee on Treaties, *Hansard* (4/9/2006) 17-18 (evidence of Joanne Blackburn, First Assistant Secretary). See also: JSCOT, *Hansard* (19/6/2006) 32 (evidence of Joanne Blackburn, First Assistant Secretary)

<sup>52</sup> see "review and release all police-to-police MOU" on page 12.

<sup>53</sup> Senate Legal and Constitutional Committee, Estimates, *Hansard* (31/10/2005) 170 (Mr Mick Keelty, AFP Commissioner).

<sup>54</sup> see "review and release government's legal advice" on page 5.

<sup>55</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information* (1979), [23.9].

<sup>56</sup> P. Brazil, *Claims of Legal Professional Privilege Exemption under Freedom of Information Act* (2 March 1986) [3].

<sup>57</sup> Phillip Coorey, 'Labor to fight death penalty', *Sydney Morning Herald* (Sydney), 9 October 2007, 4, <<http://www.smh.com.au/news/national/labor-to-fight-death-penalty/2007/10/08/1191695822424.html>>. The policy appears to be based on a paper from the Lowy Institute of International Policy: Dr Michael Fullilove, *Capital punishment and Australian foreign policy* (August 2006), available at: <<http://www.lowyinstitute.org/PublicationGet.asp?i=433>>.

<sup>58</sup> see n 2.

<sup>59</sup> Centre for Capital Punishment Studies, University of Westminster (London, UK) <<http://www.wmin.ac.uk/law/page-144>>.

<sup>60</sup> see Amnesty International Asia Pacific, *ADPAN*, <<http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/adpan>>.