

POLICY BRIEF

LOWY INSTITUTE
FOR INTERNATIONAL POLICY

AUGUST 2006

DR MICHAEL FULLILOVE
Program Director
Global Issues
Tel: +61 2 8238 9040
mfullilove@lowyinstitute.org

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

WHAT IS THE PROBLEM?

Australia is an abolitionist country. Both the Australian Government and the Opposition are opposed to capital punishment. Australia engages in modest advocacy against the death penalty but most of Canberra's efforts are directed toward cases involving Australian citizens. These are likely to continue to occur: our closest Asian neighbours retain the death penalty, and Australian nationals will probably continue to commit criminal acts carrying this penalty. Situations involving Australians often do violence to bilateral relations. For example, the looming execution of Van Tuong Nguyen last year led to calls from Australian commentators for trade and business sanctions against Singapore, and charges of hypocrisy being levelled against Australia in the regional press.

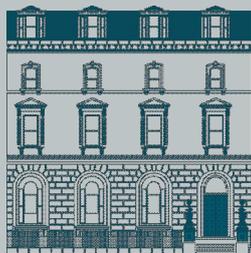
The problem, then, is twofold: Australian diplomacy is making little progress toward universal abolition, a bipartisan national policy; and our bilateral relationships are being damaged because of our perceived hypocrisy on the issue.

WHAT SHOULD BE DONE?

Australia is an effective advocate for our nationals on death row. However, we should accelerate our efforts on comprehensive abolition, in two ways:

- *Australian political leaders should bring some consistency to their rhetoric on the death penalty; and*
- *Australia should initiate a regional coalition against capital punishment. In the past decade five Asian states have done away with the death penalty. In partnership with abolitionist Asian states, we should devise creative ways to nudge others toward abolition.*

Speaking with one voice on capital punishment and leading from the front would increase our chances of making a difference. It would also disarm those regional critics who charge that Australia cares only about its own. In other words a forward-leaning policy would conform with Australian interests as well as Australian values. It would be the smart thing to do as well as the right thing.



LOWY INSTITUTE FOR
INTERNATIONAL POLICY
31 Bligh Street
Sydney NSW 2000
Tel: +61 2 8238 9000
Fax: +612 8238 9005
www.lowyinstitute.org

The Lowy Institute for International Policy is an independent international policy think tank based in Sydney, Australia. Its mandate ranges across all the dimensions of international policy debate in Australia — economic, political and strategic — and it is not limited to a particular geographic region. Its two core tasks are to:

- produce distinctive research and fresh policy options for Australia's international policy and to contribute to the wider international debate.
- promote discussion of Australia's role in the world by providing an accessible and high quality forum for discussion of Australian international relations through debates, seminars, lectures, dialogues and conferences.

Lowy Institute Policy Briefs are designed to address a particular, current policy issue and to suggest solutions. They are deliberately prescriptive, specifically addressing two questions: What is the problem? What should be done?

The views expressed in this paper are entirely the author's own and not those of the Lowy Institute for International Policy.

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

Capital punishment in Asia and the world

The death penalty is an ugly feature of the world in which we live. 71 countries and territories retain and use the death penalty. Accurate numbers are impossible to obtain because many countries refuse to produce official statistics on death sentences and executions. However, Amnesty International estimates that at least 2,148 people were executed in 2005 and 5,186 people were sentenced to death. The global death row accommodates at least 20,000 individuals. These are minimum figures: the actual totals are probably much higher.¹

The Asian region, in which Australia does much of its commercial and diplomatic business, is world's best practice when it comes to executing people. Fifteen Asian states retain the death penalty for ordinary crimes: Bangladesh, China, India, Indonesia, Japan, North Korea, South Korea, Laos, Malaysia, Mongolia, Pakistan, Singapore, Taiwan, Thailand and Vietnam.² China and Singapore in particular have distinguished themselves. Public reports indicate that at least 1,770 people were executed in China last year, which represents more than 80% of known executions worldwide. (Again, the true number is likely to be much higher than this.) In the period 1999-2003, Singapore boasted by far the highest per capita execution rate in the world: 6.9 executions per 1 million people. Since 2000, methods of execution in Asia have included hanging (Japan and Singapore), shooting by firing squad or with a single bullet to the back of the head (China, Taiwan and Vietnam), and lethal injection (China and Thailand).³

However, the news is not all bad for those who oppose capital punishment; indeed, progress is being made. Since 1990, over forty countries have abolished the death penalty for all crimes. In our own region, five Asian states have abolished the death penalty in the past decade and a half: Cambodia (1989), Nepal (1997), Timor-Leste (1999), Bhutan (2004), and the Philippines, where President Gloria Macapagal-Arroyo signed a bill outlawing the death penalty on 24 June this year. In addition, Brunei Darussalam, Maldives, Myanmar and Sri Lanka are regarded as abolitionist in practice, even if not at law.⁴

Why is the death penalty an issue for Australia?

The persistence of capital punishment in our region and around the world is an issue for Australia, and not only when the condemned person is an Australian national.⁵ In the case of Australians, of course, the case is black and white. All governments have a consular responsibility to assist their nationals when they are in difficulties abroad, especially when their lives are at risk. Shortly after the execution of Nguyen Tuong Van last December, Foreign Minister Alexander Downer stated the position plainly: 'We will always make representations on behalf of Australian citizens who are given the death penalty. We will always seek clemency on their behalf.'⁶

Van Nguyen was the first Australian to be executed in Singapore since its independence and the first to be executed overseas since 1993. However he is unlikely to be the last. Currently, at least four Australian nationals are at serious risk of execution.⁷

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

- Andrew Chan and Myuran Sukumaran of the Bali Nine, sentenced to death in February for attempted heroin smuggling, are appealing their convictions. Recent comments by Indonesian President Susilo Bambang Yudhoyono indicated that clemency is unlikely to be awarded to convicted drug traffickers.
- Trinh Huu, sentenced to death last December in Vietnam for drug trafficking, had his appeal rejected in April. He has applied for clemency.
- An unnamed Australian in Lebanon is facing murder charges which could lead to a sentence of death. The case has not yet gone to trial.

Furthermore, other Australians are likely to join them on death row. Many of our closest neighbours, including our key source and transit countries, retain the death penalty for drug trafficking and other serious offences. Given the frailties of human nature, Australian nationals are likely to commit these crimes – in particular the carriage of commercial quantities of illegal drugs – and to be called to account for them.

Quite apart from Australia's specific responsibility in the case of Australians facing the death penalty, however, we should also be active on the question of universal abolition, for reasons of both values and interests.

State-sanctioned killing clearly engages Australian values. Opponents of capital punishment make a variety of persuasive arguments: that it offends human dignity; that it brutalises the societies which employ it; that

innocent people will be executed because of the inability of legal systems (especially, but certainly not only, in the developing world) to eliminate error and prejudice; that it causes unacceptable suffering to the condemned and their innocent loved ones; that it does not deter the commission of crime. One of the most compelling historical critiques of capital punishment was George Orwell's account of a hanging in colonial Burma. Walking behind the condemned man on the way to the gallows, Orwell noticed him step slightly aside to avoid a puddle on the path:

'It is curious, but till that moment I had never realized what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to avoid the puddle, I saw the mystery, the unspeakable wrongness, of cutting a life short when it is in full tide. This man was not dying, he was alive just as we were alive. All the organs of his body were working – bowels digesting food, skin renewing itself, nails growing, tissues forming – all toiling away in solemn foolery. His nails would still be growing when he stood on the drop, when he was falling through the air with a second to live. His eyes saw the yellow gravel and the grey walls, and his brain still remembered, foresaw, reasoned – reasoned even about puddles. He and we were a party of men walking together, seeing, hearing, feeling, understanding the same world; and in two minutes, with a sudden snap, one of us would be gone – one mind less, one world less.'⁸

Australian public opinion is divided on the merits of capital punishment. Poll results vary depending on the question asked and the salience of the issue at the time of polling. For

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

example, in November 2005, Roy Morgan found that only 27% of respondents believed the penalty for murder should be death – the lowest figure ever recorded and half of what it was a decade ago. On the other hand Morgan recorded that 47% of Australians believed that Van Nguyen’s death penalty should be carried out. In August 2003, Newspoll found that a majority of respondents supported the reintroduction of capital punishment for terror attacks committed in Australia.⁹

Ultimately, it is not necessary to litigate the pros and cons of the issue. We do not start with a blank sheet. The Australian Government is opposed to capital punishment. The last Australian executed in this country was Ronald Ryan in 1967. The death penalty has been abolished by the Commonwealth of Australia and all its States and Territories. Canberra has acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which prohibits the execution of any person within the jurisdictions of the states party to it.¹⁰ Official documents set out Australia’s opposition to the death penalty on the universal ground that it is ‘an inhumane form of punishment which violates the most fundamental human right – the right to life.’ We consistently sign up to UN resolutions calling upon all states to abolish it. Furthermore, at the political level an effective consensus exists that capital punishment is bad and Australia should work against it. Prime Minister John Howard has said ‘I don’t believe in capital punishment’ and Foreign Minister Alexander Downer has confirmed ‘the Australian Government has a longstanding policy of opposition to the death penalty.’ The alternative Prime Minister and Foreign Minister, Kim Beazley and Kevin Rudd, have

stated that Labor is opposed to the death penalty worldwide. The other political parties concur.¹¹

Unless and until our elected representatives decide otherwise, the settled policy of the Australian Government is to oppose capital punishment. Successive governments have indicated that the death penalty offends Australian values – and as Prime Minister Howard has rightly said (albeit in another context): ‘in the end a nation’s foreign policy must be values-based.’¹²

Maintaining our opposition to the death penalty in relation to foreigners as well as Australians conforms with our values. It also serves our national interests.¹³ Four Australians currently sit on death row and in all likelihood, others will join them there. The best position from which to petition foreign governments on behalf of our nationals is that of consistent and strong opposition to the death penalty regardless of the nationality of the condemned. Such a stance would enable the government to deal with the issue positively and continually, rather than negatively and sporadically. It would increase the momentum toward universal prohibition and bulletproof us against claims of hypocrisy.

If, on the other hand, we create a perception that we are concerned only or principally with capital punishment when it involves Australians, then we open ourselves to accusations of special pleading. Indeed, these accusations are already being made. In the lead-up to Van Nguyen’s execution, for instance, the Singaporean and Malaysian press contained statements to the effect that, as a commentator for *The Straits Times* put it, ‘Australians...

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

practise double standards.’ ‘Singaporeans live under the very same laws that convicted Nguyen’, stated another columnist. ‘Are the Australian government and people suggesting that because he carried an Australian passport, he is therefore above our laws?’¹⁴ Anecdotal evidence confirms that this perception exists in a number of southeast Asian countries. The best way to disarm these kinds of critics is to act consistently.

It is understandable and appropriate that Australia places a particular priority on the welfare of its own citizens. It would be naïve to imagine that any national government would ever be indifferent to the kind of passport held by an individual facing execution – nor should it be. However, vigorous opposition to capital punishment in general is likely to bolster a government’s credibility in opposing certain specific executions.

Australians on death row

If it accords with Australian values and serves Australian interests to lobby for our nationals on death row and pursue universal abolition – and furthermore it is our stated policy to do so – then how well are we performing? The answer is: fairly well on the consular side, and fairly modestly on the universal side.

In relation to Australian nationals, the Department of Foreign Affairs and Trade (DFAT) always seeks clemency for Australians sentenced to death. It takes a pragmatic approach to each case, using the arguments it judges are most likely to find success. In some cases, for example, the emphasis is put on an individual’s personal circumstances; in others,

on the strength of the bilateral relationship. Generally DFAT prefers high-level political representations to interventions in local judicial processes, unless there is strong evidence that due process has not been followed. Representations are made by senior officials, the Foreign Minister, and on occasion, the highest officeholders in the land. In the case of Van Nguyen, for example, several dozen written and personal representations were made to the President, Prime Minister and other senior ministers of Singapore by the Australian Governor-General, Prime Minister, Foreign Minister, Trade Minister, Attorney-General, Justice Minister and Parliamentary Secretary for Foreign Affairs, as well as our High Commissioner in Singapore and other officials.¹⁵

It is not easy to judge the effectiveness of diplomacy that is often quiet. Certainly it is vigorous, as one would expect, and as the political imperative requires. There was criticism of the Government’s handling of Van Nguyen’s case, but it is hard to imagine what more Canberra could have done that would have altered Singapore’s implacable, clinical determination to put him to death. Furthermore, our consular efforts have their successes as well as failures: earlier this year, for example, the President of Vietnam commuted the death sentences of Australian citizen Mai Cong Thanh and Australian permanent resident Nguyen Van Chinh after a full-court diplomatic press by Canberra, including personal lobbying by Mr Howard.¹⁶

As Van Nguyen’s execution loomed last year, a number of politicians suggested that Canberra should up the ante by interrupting bilateral trade or limiting the Australian activities of

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

Singaporean businesses. Liberal backbencher Bruce Baird MP, for example, argued the Government should take Singapore's behaviour into account when considering whether Singapore Airlines should be given access to the Sydney-Los Angeles air route; Greens Senator Kerry Nettle raised the possibility of trade sanctions and even military sanctions.¹⁷ These kinds of prescriptions are flawed. They would fail the effectiveness test, as they would be highly unlikely to save any Australian lives. Sovereign governments tend not to take well to bullying, especially by a middle-sized power. They would damage other Australian interests and make us a less effective international player. Finally, their limitation to cases involving Australian citizens would undermine the moral strength of our abolitionist position.

Universal abolition

In relation to Australians on death row, then, the Government is reasonably effective. In relation to universal abolition, however, we do less than we should.

Certainly, we oppose the death penalty at the multilateral and bilateral levels. We join other abolitionist states in co-sponsoring an annual UN resolution calling upon all states to abolish or limit the death penalty.¹⁸ At the request of the European Union, which takes the lead on these resolutions, Australia has lobbied Pacific Island countries to join the ranks of the co-sponsors.

From time to time Australia also makes bilateral representations on behalf of non-Australians on death row, usually on the basis of information provided by Amnesty

International. Sometimes those representations are made within the context of the ongoing human rights dialogues Australia maintains with China, Vietnam and Iran. Current and former Australian diplomats involved with the making of such representations differ on their value. Speaking off the record, one said that representations are 'very formulaic... the point is to make no waves but to be able to tell the non-governmental organisations (NGOs) we've done it.' Another observed that the making of representations gives the Foreign Minister a story to tell the human rights NGOs at his biannual meeting with them. A third official, by contrast, was more positive, saying the effect of representations is in the nature of 'water dripping on stone.' He argued that 'a structured diplomatic exchange' can initiate a useful discussion, although it depends on whether the official 'reads it off a sheet or delivers it with conviction'.

In sum, the Australian Government serves in the ranks of the anti-death penalty forces. However the issue is not accorded a high diplomatic priority. Few observers would identify Canberra as a leader in the international abolition movement.

What should be done?

Australia should take universal abolition more seriously and accelerate its efforts on this bipartisan policy issue. There are two steps Australia should take.

1. Be consistent in our public comments

In the advocacy of human rights, consistency is a virtue. The Australian international relations scholar R.J. Vincent observed that 'finding its

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

place in the empire of circumstance is more damaging to human rights policy than it might be to other items of foreign policy, because... it is on the substance and appearance of even-handedness that a successful human rights policy depends.' Of course, true consistency is only possible for angels, not governments. No Australian government will ever be as exercised by the execution of someone from Mumbai as it is by the execution of someone from Melbourne. Different circumstances require different approaches.¹⁹ That said, a general consistency of direction is essential.

However it is difficult to discern such consistency in the recent comments of Australian politicians about the death penalty; instead, we have seen blatant and apparently deliberate departures from Australia's official position. For example, in February 2003 Mr Howard said that if the perpetrators of the 2002 Bali bombing, which killed 202 people including 88 Australians, were sentenced to death there 'won't be any protest from Australia'. The following month the Prime Minister told America's Fox 9 News Channel that he would welcome the execution of Osama Bin Laden.²⁰ In August 2003, the then Labor frontbencher Mark Latham rejoiced in the sentencing of Bali bomber Amrozi to death by firing squad: 'I think it's a day where all political parties should be celebrating, thankful for the fact that one of the bastards has been got and he's going to face the full weight of the law in the jurisdiction where this act of evil was committed.'²¹

The capture of Saddam Hussein in December 2003 produced a rare example of unanimity between Mr Latham, the newly elected Opposition Leader, and his opponent Mr

Howard, who both declared they would not object to his execution.²²

This kind of inconsistency erodes the abolitionist underpinnings of our stance. It makes us look hypocritical when we ask for our own people to be spared. As a commentator remarked in *The Straits Times* in December 2005: 'those who are most critical of the Singapore authorities in the Nguyen case are silent when it comes to Amrozi, who is on death row in Indonesia for his role in the Bali bombing which killed many Australians... Is this a case of double standards – death for Amrozi because he killed Australians, leniency for Nguyen because he is Australian? Why is the death penalty 'barbaric' in one case, but not the other?'²³

Opposing capital punishment in all cases, including the hardest cases, buttresses our position in relation to Australians on death row. Our political leaders should ensure that Australia's principled opposition to the death penalty is reflected in their public comments. They should resist the temptation to play to the gallery, even in relation to individuals who have caused great suffering to Australians and in relation to important friends and allies such as Indonesia and the United States.

2. Initiate a regional coalition against the death penalty

We need to get our death penalty rhetoric right. We also need to create some diplomatic reality behind it. The Government should signal that universal abolition is an Australian diplomatic priority and devise a strategy to advance the issue.

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

One approach would be to work more closely with the Europeans, who form the most strictly abolitionist international bloc. Some Australian officials criticise the Europeans' approach as 'press release diplomacy', but it is impossible to deny the impact that their sustained advocacy has had on the issue generally or in particular cases such as the Philippines and Turkey, which limited its application of the death penalty in order to boost its case for entry to the European Union.

However a better approach would be for Australia to start its work in Asia, the region where we deploy our greatest diplomatic resources and which also happens to be the location of most of the world's executions. Australia has an activist diplomatic tradition within the region and some experience in building constituencies for particular initiatives, as demonstrated by our work on the Cambodian peace process and the establishment of the Asia-Pacific Economic Cooperation forum (APEC). Australia should initiate a regional coalition of Asian states opposed to the death penalty, in order to build on the momentum created by its abolition in five Asian jurisdictions in the past decade. If we make common cause with Cambodians, Nepalese, East Timorese, Bhutanese, Filipinos and others, we will increase our points of influence and decrease the ability of death penalty proponents to accuse us of neo-colonialism.

The work of the coalition should be guided by the principles of effectiveness and prudence. The issuing of loud condemnations and the indiscriminate raising of trade and military sanctions would leave Australia poor and friendless, and furthermore would be unlikely

to save a single life. Instead we should look for creative approaches to nudge regional countries toward abolition.

There are a number of ways to structure the coalition's work, none of it absolutist in tone. Megaphones need not be employed. We may find it politic to focus our resources on *de facto* abolitionist countries such as Sri Lanka, and seek to move them up the spectrum towards formal abolition. A particular opportunity exists in the case of South Korea, which has not executed anyone since 1998 but maintains a death row of sixty-odd individuals. There is a growing movement in South Korea to abolish capital punishment in favour of life imprisonment without parole, which is supported by former President Kim Dae-jung and was kicked along this year by the Justice Ministry's announcement that it will study the case for abolition. A similar debate is stirring in Malaysia, led by the Bar Council and a Cabinet Minister.²⁴ Ultimately this issue will be decided in Seoul and Kuala Lumpur, of course, but a regional grouping may be able to influence the thinking in those and other capitals.

There are other strategies we could employ, all of them more nuanced than simply demanding universal abolition immediately. For example, the coalition could encourage retentionist countries to:

- Announce a moratorium on executions as part of a move toward complete abolition;
- Restrict the number and type of offences for which capital punishment is imposed;
- Abolish mandatory death penalties (such as the one according to which Van Nguyen was executed);

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

- Release comprehensive official statistics about their use of the death penalty;
- Guarantee that death sentences will not be carried out on children, pregnant women, new mothers, or the insane; and that it will only be applied after a fair trial, and when the individual's guilt has been established by clear evidence, leaving no room for alternative explanation;
- Institute safeguards to protect the rights of those on death row, for example the right to appeal to a court of higher jurisdiction, the right to seek a pardon or commutation, and the right not to be executed pending any such appeal.²⁵

The regional coalition should be inter-governmental in nature, but the Government could also consider appointing a high-level advisory body composed of eminent people. An Australian example of this model was the Keating Government's Canberra Commission on the Elimination of Nuclear Weapons, whose membership included Robert McNamara, Michel Rocard, Richard Butler and Robert O'Neill and which produced an impressive report in 1996.²⁶ An example which achieved considerably more success was Canada's International Commission on Intervention and State Sovereignty (ICISS), which was co-chaired by former Foreign Minister Gareth Evans and whose membership included Michael Ignatieff, Fidel Ramos and Ramesh Thakur. The ICISS's highly influential report, *The Responsibility to Protect*, argued for the existence of an emerging norm, after Somalia, Bosnia-Herzegovina, Rwanda and Kosovo, that a collective international responsibility to protect civilians exists in the case of genocide, ethnic cleansing

and widespread violations of human rights. That idea has been embraced widely and was adopted by national heads of government at the UN's 2005 World Summit in New York.²⁷ A high-level advisory group of this kind could generate ideas and provide political cover for the regional coalition.

Conclusion

By being inconsistent and declaratory about capital punishment, we look hypocritical and weak. Stepping up our efforts toward universal abolition, by contrast, would not only be the right thing to do but the smart thing. If we put our shoulder to this wheel, we may even be able to move it a little; certainly, wheels rarely move without pushing.

Acknowledgments

I am grateful for the excellent research assistance provided by Moya Collett, a PhD candidate at the University of New South Wales. Joanne Bottcher was as efficient as ever. Thanks also to my interviewees and readers, including: Tim Goodwin of Amnesty International, a leading death penalty opponent; John North of the Law Council of Australia; Allan Gyngell and Dr Malcolm Cook of the Lowy Institute; and various Australian officials.

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

BIBLIOGRAPHY

Amnesty International, *Facts and figures on the death penalty*:

<http://web.amnesty.org/pages/deathpenalty-facts-eng>.

_____, *Abolitionist and retentionist countries*:

<http://web.amnesty.org/pages/deathpenalty-countries-eng>.

Beazley, Kim, *Interview with Philip Clark, Radio 2GB, 14 February 2006*,

<http://www.alp.org.au/media/0206/riloo141.php>.

Cagahastian, David, *Bill abolishing death penalty signed – all death sentences now commuted to life. Manila Bulletin*, 25 June 2006.

Camus, Albert, *Reflections on the guillotine*. Translated from the French by Richard Howard. Michigan City, Fridtjof-Karla Publications, 1959.

Canberra Commission on the Elimination of Nuclear Weapons, *Report of the Canberra Commission on the Elimination of Nuclear Weapons*. Canberra, Dept of Foreign Affairs and Trade, 1996:

<http://www.dfat.gov.au/cc/cchome.html>.

Carlyon, Patrick, *Swinging voters. The Bulletin*, 1 March 2006.

Carr, E.H., *The twenty years' crisis 1919-1939: an introduction to the study of international relations*. London, Macmillan, 1970.

China's world record – 8,000 dead?, Asia Death Penalty blog, 1 March 2006:

<http://asiadeathpenalty.blogspot.com/2006/03/chinas-world-record-8000-dead.html>.

Dae-woong, Jin, *Former President Kim calls for end to death penalty. The Korea Herald*, 27 February 2006.

Debates rekindled on death penalty. *The Korea Times*, 23 February 2006.

Department of Foreign Affairs and Trade, *Human Rights Manual*. Canberra, Commonwealth of Australia, 2004:

http://www.dfat.gov.au/hr/hr_manual_2004/hr_manual.pdf.

_____, *What we do*:

<http://www.dfat.gov.au/dept/whatwedo.html>.

Donnelly, Jack, *Universal human rights in theory and practice*. Ithaca, Cornell University Press, 1989.

Downer, Alexander, *House of Representatives Hansard*, 14 February 2006, p.3:

<http://www.aph.gov.au/hansard/reprs/dailys/dr140206.pdf>.

_____, *House of Representatives Hansard*, 13 February 2006:

<http://www.aph.gov.au/hansard/reprs/dailys/dr130206.pdf>.

_____, *List of representations to Singapore Ministers and President*, 28

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

November 2005:

http://www.foreignminister.gov.au/releases/2005/nguyen_van_tuong_representation_singapore.html.

Fernandez, Warren, Real villains in Nguyen case. *The Straits Times*, 3 December 2005.

Grattan, Michelle, Airline row linked to Nguyen. *The Age*, 24 November 2005, p.1.

Greens say increase pressure on Singapore. *AAP*, 27 November 2005.

Greens, The, *Government doesn't abhor death penalty*. Media release, 29 November 2005: http://www.bobbrown.org.au/600_media_sub.php?deptItemID=1833.

Harries, Owen, *Morality and foreign policy*. CIS Occasional Paper 94. Sydney, Centre for Independent Studies, 2005.

Hearing on death penalty. *The Korea Herald*, 3 April 2006.

Howard, John, *Interview on Fox 9 News Channel*, 7 March 2003: <http://www.pm.gov.au/news/interviews/Interview261.html>.

_____, *Interview on Sunday Sunrise, Channel 7*, 16 February 2003: <http://www.pm.gov.au/news/interviews/Interview244.html>.

_____, *Interview with Neil Mitchell, Radio 3AW*, 2 December 2005: <http://www.pm.gov.au/news/interviews/Interview1709.html>.

_____, *Joint press conference with then British Foreign Secretary Jack Straw*, November 2003: <http://www.pm.gov.au/News/interviews/Interview564.html>.

Koestler, Arthur, *Reflections on hanging*. London, Victor Gollancz, 1956.

Lasry, Lex, Australia and the death penalty – are we really against it? Costello Lecture, Monash University, 29 March 2006: <http://www.law.monash.edu.au/alumni/events/deathpenalty.pdf>.

Lewis, Steve, Terrorists should die: poll – majority in support of Amrozi execution. *The Australian*, 19 August 2003, p.1.

Loo Kok Wee, Wilson, Australians shouldn't get special treatment. *The Straits Times*, 30 November 2005.

Malaysian law minister supports abolishing death penalty. *Dow Jones International News*, 21 March 2006.

Morgenthau, Hans J., *Human Rights and Foreign Policy*. New York, Council on Religious and International Affairs, 1979.

_____, *Politics among nations: the struggle for power and peace*. 6th rev ed. New York, McGraw-Hill, 1985.

Ooi Chen Ni, Pauline, Does Aussie passport put one above law? *The Straits Times*, 23 November 2005.

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

Orwell, George, 'A hanging', in *Shooting an elephant and other essays*. London, Secker and Warburg, 1953.

The question of the death penalty: seventh quinquennial report of the Secretary-General to the UN Economic and Social Council, 9 March 2005, E/2005/3:
<http://www.un.org/docs/ecosoc/documents.asp?id=880>.

Roxon, Nicola, *Call to action on anniversary of Death Penalty Protocol*. Australian Labor Party media statement, 11 July 2006:
<http://www.alp.org.au/media/0706/msag110.php>.

Roy Morgan Research, *Australians divided over hanging of Van Nguyen*. Finding No. 3947, 1 December 2005:
<http://www.roymorgan.com/news/polls/2005/3947/>.

Rudd, Kevin, *Doorstop interview, 4 December 2005*:
<http://www.alp.org.au/media/1205/dsifaistra040.php>.

Soorian, A., Australia's double standards. *New Straits Times*, 25 November 2005.

Stott-Despoja, Natasha, *Senate Hansard*, 28 November 2005, p.59:
<http://www.aph.gov.au/hansard/senate/dailys/ds281105.pdf>.

Teo, Laurel, To hang or not to hang? activists must be consistent. *The Straits Times*, 11 November 2005.

United Nations. Economic and Social Council, *The question of the death penalty: report of the*

Secretary-General, E/CN.4/2006/83, 10 February 2006:
<http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.

United Nations. General Assembly, *2005 World Summit Outcome, 15 September 2005*:
<http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>.

United Nations. Office of the High Commissioner for Human Rights, *Second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*:
http://www.unhchr.ch/html/menu3/b/a_opt2.htm.

_____, *The question of the death penalty: Human Rights Resolution 2005/59*:
http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-59.doc.

Vincent, R. J., *Human rights and international relations*. Cambridge, Cambridge University Press, 1986.

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

NOTES

¹ This Policy Brief uses statistics from Amnesty International (AI), which are generally regarded as being authoritative and up-to-date: see AI, *Facts and figures on the death penalty* :

<http://web.amnesty.org/pages/deathpenalty-facts-eng>;
Abolitionist and retentionist countries:

<http://web.amnesty.org/pages/deathpenalty-countries-eng>. United Nations (UN) estimates contain marginally different country counts, based on a different definition of countries that are *de facto* abolitionist: see *The question of the death penalty*. Report of the Secretary-General to the UN Economic and Social Council, E/CN.4/2006/83, 10 February 2006:

<http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.

² 'Asia' is defined as northeast, south and southeast Asia. AI, *Abolitionist and retentionist countries*: <http://web.amnesty.org/pages/deathpenalty-countries-eng>.

³ AI, *Facts and figures on the death penalty*: <http://web.amnesty.org/pages/deathpenalty-facts-eng>; *The question of the death penalty*, Seventh quinquennial report of the Secretary-General to the UN Economic and Social Council, 9 March 2005, E/2005/3:

<http://www.un.org/docs/ecosoc/documents.asp?id=880>, table 2 and paragraph 48. Earlier this year it was reported that a Chinese legal scholar had estimated, based on information from local officials and judges, that approximately 8,000 people are executed in China each year: see *China's world record – 8,000 dead?* 1 March 2006: <http://asiadeathpenalty.blogspot.com/2006/03/chinas-world-record-8000-dead.html>.

⁴ *The question of the death penalty*. Report of the Secretary-General to the UN Economic and Social Council, E/CN.4/2006/83, 10 February 2006,

<http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>; AI, *Abolitionist and retentionist countries*:

<http://web.amnesty.org/pages/deathpenalty-countries-eng>. AI defines 'abolitionist in practice' as including countries which retain the death penalty but have not executed anyone for a decade and are believed to have a policy or established practice of not carrying out executions. On the Philippines, see David Cagahastian, Bill abolishing death penalty signed – all death sentences now commuted to life, *Manila Bulletin*, 25 June 2006.

⁵ This Policy Brief examines capital punishment in Australian foreign policy. It does not deal with the related issues of international criminal cooperation, for example extradition, mutual legal assistance and police-to-police cooperation.

⁶ *House of Representatives Hansard*, 13 February 2006, p.3:

<http://www.aph.gov.au/hansard/reps/dailys/dr130206.pdf>. See also *What we do*: <http://www.dfat.gov.au/dept/whatwedo.html>.

⁷ Other Australians are also in danger, although the risk is less immediate than for these four. Dr Aggrey Kiyingi is on trial for murder in Uganda, but it had been thought that if convicted he would be unlikely to receive the death penalty. Recent media coverage, however, appears to indicate that execution is a real possibility. Henry Chhin is serving a 'suspended death sentence' in China, which will probably be reviewed in September 2007 and either commuted or carried out.

⁸ George Orwell, 'A hanging', in *Shooting an elephant and other essays*. London, Secker and Warburg, 1953, pp.13-14. See also Albert Camus, *Reflections on the guillotine*. Michigan City, Fridtjof-Karla Publications, 1959; Arthur Koestler, *Reflections on hanging*. London, Victor Gollancz, 1956; Hugo Adam Bedau and Paul G. Cassell, eds,

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

Debating the death penalty: should America have capital punishment? The experts on both sides make their best case. New York, Oxford University Press, 2004.

⁹ Roy Morgan, *Australians divided over hanging of Van Nguyen*, Finding No. 3947, 1 December 2005: <http://www.roymorgan.com/news/polls/2005/3947/>; Steve Lewis, Terrorists should die: poll – majority in support of Amrozi execution, *The Australian*, 19 August 2003, p.1. See also Patrick Carlyon, Swinging voters, *The Bulletin*, 1 March 2006.

¹⁰ *Second Optional Protocol to the International Covenant on Civil and Political Rights*: http://www.unhchr.ch/html/menu3/b/a_opt2.htm. Australia acceded to the Protocol on 2 October 1990, however it has not yet been incorporated into Australian domestic law by an Act of the Australian Parliament.

¹¹ Department of Foreign Affairs and Trade, *Human Rights Manual*. Canberra, Commonwealth of Australia, 2004, p.33:

http://www.dfat.gov.au/hr/hr_manual_2004/hr_manual.pdf; John Howard, *Interview with Neil Mitchell*, Radio 3AW, 2 December 2005:

<http://www.pm.gov.au/news/interviews/Interview1709.html>; Alexander Downer, *House of Representatives Hansard*, 14 February 2006, p.3:

<http://www.aph.gov.au/hansard/rep/dailys/dr140206.pdf>; Kim Beazley, *Interview with Philip Clark*, Radio 2GB, 14 February 2006:

<http://www.alp.org.au/media/0206/riloo141.php>; Kevin Rudd, *Doorstop interview*, 4 December 2005: <http://www.alp.org.au/media/1205/dsifaistra040.php>;

see also Nicola Roxon, *Call to action on anniversary of Death Penalty Protocol*, media statement 1 July 2006:

<http://www.alp.org.au/media/0706/msag110.php>.

Regarding Democrat and Green opposition to capital punishment, see: Government doesn't abhor death penalty, 29 November 2005:

http://www.bobbrown.org.au/600_media_sub.php?deplItemID=1833; Senator Natasha Stott-Despoja, *Senate Hansard*, 28 November 2005, p.59: <http://www.aph.gov.au/hansard/senate/dailys/ds281105.pdf>. An official from the Nationals' Federal Secretariat indicated by private communication that the Nationals' policy conforms with the Government's.

¹² John Howard, *Joint press conference with then British Foreign Secretary Jack Straw*, November 2003:

<http://www.pm.gov.au/News/interviews/Interview564.html>.

¹³ A Policy Brief is not the appropriate venue for a discussion of the relationship between values, interests and foreign policy. However Owen Harries was surely correct when he argued in his recent elegant survey that the 'characteristic fault of realism is that it believes the application of a morality to foreign policy to be negligible, if not entirely irrelevant.' E.H. Carr argued similarly that 'it is an unreal kind of realism which ignores the element of morality in any world order.' Harries followed Edmund Burke, Hans J. Morgenthau and others in advocating a morality of prudence. Some realist scholars allow that human rights advocacy, for example, has a legitimate place in diplomacy so long as it is not pursued in a categorical or absolute way; sometimes it can even promote other state interests. Jack Donnelly has argued persuasively that realism 'provides no good theoretical ground for excluding human rights before the fact. In certain (contingent) circumstances it may be unwise to pursue human rights, but that must be determined empirically, case by case.' See Owen Harries, *Morality and foreign policy*. Sydney, CIS Occasional Paper 94, 2005, p.23; E.H. Carr, *The twenty years' crisis 1919-1939: an introduction to the study of international relations*. London, Macmillan, 1970, p.235; Hans J. Morgenthau, *Politics among nations: the struggle for*

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

power and peace., 6th rev ed. New York, McGraw-Hill, 1985, pp.10-11, 14-15, 236-237; Hans J. Morgenthau, *Human rights and foreign policy*. New York, Council on Religious and International Affairs, 1979, p.6; Jack Donnelly, *Universal human rights in theory and practice*. Ithaca, Cornell University Press, 1989, p.232.

¹⁴ See e.g. Wilson Loo Kok Wee, Australians shouldn't get special treatment, *The Straits Times*, 30 November 2005; Pauline Ooi Chen Ni, Does Aussie passport put one above law? *The Straits Times*, 23 November 2005; A. Soorian, Australia's double standards, *New Straits Times*, 25 November 2005.

¹⁵ Alexander Downer, *List of representations to Singapore Ministers and President*, 28 November 2005: http://www.foreignminister.gov.au/releases/2005/ngu_yen_van_tuong_representation_singapore.html.

¹⁶ DFAT provides general consular assistance to Australian citizens and permanent residents equally, with the exception of some financial transactions such as prisoner loans. Australian permanent residents sentenced to death are dealt with in exactly the same way as Australian citizens.

¹⁷ 'Michelle Grattan, Airline row linked to Nguyen, *The Age*, 24 November 2005, p.1; Greens say increase pressure on Singapore, *AAP*, 27 November 2005.

¹⁸ See e.g. Resolution 2005/59 at the Commission on Human Rights: <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN-4-RES-2005-59.doc>. Abolitionist resolutions are generally put in similar terms in several UN forums including the Commission on Human Rights (now replaced by the Human Rights Council) and the Economic and Social Council.

¹⁹ R.J. Vincent, *Human rights and international relations*. Cambridge, Cambridge University Press, 1986, p.136. On the importance of judgment in

differentiating between cases, see Owen Harries, *Morality and foreign policy*, p.18.

²⁰ John Howard, *Interview on Sunday Sunrise, Channel 7*, 16 February 2003:

<http://www.pm.gov.au/news/interviews/Interview244.html>; John Howard, *Interview on Fox 9 News Channel*, 7 March 2003:

<http://www.pm.gov.au/news/interviews/Interview261.html>.

²¹ Mark Latham quoted on Lateline, ABC Television, 9 August 2003:

<http://www.abc.net.au/lateline/content/2003/s920638.htm>.

²² Mark Latham and John Howard quoted on *The World Today*, ABC Radio, 15 December 2003:

<http://www.abc.net.au/worldtoday/content/2003/s1010314.htm>. Other examples are cited in Lex Lasry, *Australia and the death penalty – Are we really against it?* Costello Lecture, Monash University, 29 March 2006.

²³ Warren Fernandez, Real villains in Nguyen case, *The Straits Times*, 3 December 2005. See also Laurel Teo, To hang or not to hang? Activists must be consistent, *The Straits Times*, 11 November 2005.

²⁴ On South Korea, see e.g. Hearing on death penalty, *The Korea Herald*, 3 April 2006; Jin Dae-woong, Former President Kim calls for end to death penalty, *The Korea Herald*, 27 February 2006; Debates rekindled on death penalty, *The Korea Times*, 23 February 2006. On Malaysia, see e.g. Malaysian law minister supports abolishing death penalty, *Dow Jones International News*, 21 March 2006.

²⁵ These kinds of limitations are included in the various UN resolutions on capital punishment, e.g. Resolution 2005/59 at the Commission on Human Rights: <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN-4-RES-2005-59.doc>.

POLICY BRIEF

CAPITAL PUNISHMENT AND AUSTRALIAN FOREIGN POLICY

²⁶ *Report of the Canberra Commission on the Elimination of Nuclear Weapons*. Canberra, Australian Government, 1996:
<http://www.dfat.gov.au/cc/cchome.html>.

²⁷ See 2005 World Summit Outcome, 15 September 2005, paragraphs 138-139:
<http://daccessdds.un.org/doc/UNDOC/GEN/N05/48/7/60/PDF/N0548760.pdf?OpenElement>.

ABOUT THE AUTHOR

Dr Michael Fullilove directs the global issues program at the Lowy Institute for International Policy. Previously he worked as a lawyer, a volunteer in the UN Transitional Administration in East Timor, and an adviser to Prime Minister Paul Keating. He was a consultant to Frank Lowy AC on the establishment of the Lowy Institute.

Michael graduated in government and law from the Universities of Sydney and New South Wales, with dual university medals. He also studied as a Rhodes Scholar at the University of Oxford, where he earned a master's degree in international relations and wrote his doctorate on Franklin D. Roosevelt's foreign policy. His dissertation was awarded the annual prize for the best international history thesis in Britain.

Michael publishes regularly in newspapers and journals such as the *Sydney Morning Herald*, *The Age*, *The Australian*, *Financial Times*, *International Herald Tribune*, *Times Literary Supplement*, and *Foreign Affairs*, and provides commentary for broadcasters such as the ABC, SBS and CNN. He has a forthcoming essay in *The National Interest* on China and the UN. Michael's Lowy Institute publications include *The Testament of Solomons: RAMSI and International State-building* and *Diaspora: The World-Wide Web of Australians* (with Dr Chloë Flutter). His first book, *'Men and Women of Australia!' Our Greatest Modern Speeches*, was published by Vintage in 2005.

LOWY INSTITUTE

FOR INTERNATIONAL POLICY

WWW.LOWYINSTITUTE.ORG