Mess of contradiction
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The execution of the Bali bombers by Indonesia has once again brought the death penalty into the spotlight. It has also exposed some messy contradictions in Australia’s position. While we have abolished capital punishment, we have failed to argue consistently for its eradication elsewhere. The fight needs to continue not only in places like Indonesia, but also at home. Australia should speak with a clear voice against death penalty wherever it is applied, and should also take further steps to prevent it being reintroduced into our law.

While John Howard and Kevin Rudd have strong personal views against the death penalty, this has not always been reflected in their rhetoric. Unfortunately, both have given support to the other side of the debate. The reason lies in polls like that in The Bulletin in 2005 that show a majority of Australians support capital punishment. Similarly, the ANU’s 2007 Electoral Survey found that 44% of people thought that the death penalty should be re-introduced in Australia, while 38% disagreed and the rest were undecided. While the ANU survey has showed a marked decline in support for reintroduction, down from 65% in 1998, it demonstrates high levels of support for the idea.

Despite his own opposition to the death penalty, Howard nonetheless said in 2003 that ‘everyone would welcome the death penalty for Osama bin Laden’. Similarly, he stated in regard to the Bali bombers that they ‘should be dealt with in accordance with Indonesian law …and if [the death penalty] is what the law of Indonesia provides, that is how things should proceed’.

In Opposition, Kevin Rudd was clear in stating that ‘capital punishment is unacceptable in all circumstances and in all jurisdictions’ and that it is ‘abhorrent’. He also took a stand by speaking out against the execution of Saddam Hussein, stating that even mass murderers do not deserve the death penalty. However, as Prime Minister, Rudd said that the Bali bombers ‘deserve the justice that will be delivered to them’. His government has also publicly taken the position of intervening diplomatically only in support of Australian citizens who face capital punishment. Foreign Affairs Minister Stephen Smith has thus plead for clemency for the drug smugglers from the Bali Nine who face the death penalty, but did not do so for the Bali bombers. As Scott Rush, one of the Bali Nine facing death in Indonesia, wrote to the government: ‘I don’t want to be in any way political but, from a practical point of view of someone inside on death row, it makes practical and good sense to have a consistent position of opposing the death penalty without discrimination’.

The death penalty has been absent from Australian law for more than two decades. The last State to eradicate it was New South Wales in 1985, while the first State to do so was Queensland in 1922. The last time a person was executed under such laws was Ronald
Ryan in Victoria in 1967. The Australian Capital Territory is unique in being the only State or Territory never to have carried out an execution.

More needs to be done to eradicate the death penalty in the 60 nations that still practise it and to ensure that we do not see its reintroduction in Australia. The notion that it is acceptable to execute terrorists but not other criminals, or to execute foreign nationals but not Australians, is morally and logically unsustainable. The value of a human life is not contingent on a person’s nationality or the nature of their crime. Opposition to the death penalty does not permit such shades of grey. Its removal from legal systems around the world must be an unequivocal demand.

Despite the statements from our leaders for domestic consumption, Australia has taken the right steps to rid international law of the death penalty. We ratified the second optional protocol to the International Covenant on Civil and Political Rights in 1990. It contains an absolute prohibition on the use of the death penalty, with article 1 stating that ‘No one within the jurisdiction of a State Party to the present Protocol shall be executed’. It also commits Australia to ‘take all necessary measures to abolish the death penalty within its jurisdiction’. Australia also voted for a United Nations General Assembly resolution in December 2007 that called for a global moratorium on the death penalty. The resolution was passed with 104 votes for, 54 against and 29 abstentions. Australia needs to back its international advocacy with similar statements locally from our politicians, lest our global efforts are undermined by our leaders at home.

Although the death penalty has been abolished around Australia, more needs to be done. Its removal left a silence in our law that allows for ongoing debate about the reintroduction of the penalty. In 2003, for example, Howard called for a national debate on the reintroduction of capital punishment as part of new anti-terror laws. While he said that he did not personally support this, he nonetheless suggested that the death penalty could be raised by State opposition parties as an election issue. This has not occurred, but remains a real possibility due to the already over-heated debates over law and order in places like New South Wales and the Northern Territory.

Silence needs to be replaced by a national law that bans capital punishment and provides that no jurisdiction can reintroduce it in the future. Section 51 of the Constitution grants the Commonwealth the power to pass laws on ‘external affairs’. The High Court, in decisions such as the Tasmanian Dam case in 1983, has held that Parliament can use this power to make laws for the whole of Australia that implement international treaties and conventions. Such laws then override inconsistent State or Territory laws. The Federal Parliament thus has the power to put the second optional protocol into Australian legislation to outlaw the death penalty and prevent its reintroduction by any State or Territory, a step supported by a notice of motion lodged in the Federal Parliament by New South Wales MP Chris Hayes. This law could not, however, prevent the Commonwealth from reintroducing the penalty. This highlights the need to ensure that a prohibition on the death penalty is also contained in a future national bill or charter of rights.
New legislation is needed to prevent the reintroduction of the death penalty in Australia. This will be important as a statement of Australian values and as a signal to political leaders that the nation is uncompromising in its resistance to capital punishment. We should match our strong international opposition with a campaign at home that will educate Australians and change attitudes so that the reintroduction of the death penalty is not only a legal, but a political impossibility.

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