

Further written submission to the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade – inquiry into Australia’s advocacy for the abolition of the death penalty

Dr Amy Maguire, University of Newcastle Law School

8 March 2016

In this document, I set out the references and text of a number of short commentary articles that I have published online in relation to the death penalty.

1. Amy Maguire, ‘Moratorium or not, Indonesia could be abandoning the death penalty’, *The Conversation*, 23 November 2015, <https://theconversation.com/moratorium-or-not-indonesia-could-be-abandoning-the-death-penalty-51039>

A number of news outlets reported last week that Indonesia had placed a moratorium on the death penalty. Indonesian’s co-ordinating security minister, Luhut Panjaitan, was said to announce this by saying:

We haven’t thought about executing a death penalty with the economic conditions like this.

However, Panjaitan later denied this meant an end to capital punishment in Indonesia:

No, I told them we will not carry out executions for the time being because we are now focusing on the economy.

What is a moratorium?

A moratorium means the suspension of executions. It may be official and announced, or simply practised.

Therefore, on the face of it, Indonesia has entered a moratorium of an indeterminate period. The dozens on death row in Indonesia may eventually see their sentences commuted to life imprisonment.

The last – unofficial – moratorium in Indonesia ran from 2008 to 2013 under the presidency of Susilo Bambang Yudhoyono (SBY). SBY is reported to have deeply disliked capital punishment. But his replacement, Joko Widodo, embraced executions as part of a hardline stance against drug offending.

Capital punishment globally

One hundred and forty countries have abolished the death penalty in law or practice. Fifty-eight retain the death penalty.

Many jurisdictions have abandoned capital punishment in recent years. A moratorium is a well-established step along the path to full abolition.

However, capital punishment remains a global human rights concern. In 2014, at least 22 countries carried out 607 or more executions. At least 2,466 people were sentenced to death around the world.

The five countries responsible for the most executions, according to confirmed data, were Iran (289), Saudi Arabia (90), Iraq (61), the US (35) and Sudan (23). These statistics do not include the suspected thousands of executions in China, which does not report statistics.

Are the reasons for a moratorium important?

There are many persuasive arguments against capital punishment. The death penalty violates the right to life, inflicts torture and is especially wrong where it is carried out in discriminatory ways or for crimes that are not really serious.

Further, the death penalty risks the lives of innocent people wrongly convicted. It has no proven special deterrent value.

Where a country introduces a moratorium or abolishes the death penalty, it might seem reasonable to assume that public and political opinion has identified the practice as wrong. However, capital punishment has often been abandoned for reasons that have little or nothing to do with the ethics of the practice.

Thirty-one American states retain capital punishment in law but only about eight states currently practise it. The number of executions has dropped significantly in recent years. Oklahoma introduced a moratorium in 2014, following the botched and torturous execution of Clayton Lockett.

Similar incidents have led doctors to refuse to participate in executions, and pharmaceutical companies to refuse supply of the most-tested lethal injection drugs.

In the US, as in Indonesia, moratoriums have come in response to the high costs of death-penalty prosecutions and executions.

A win for death penalty opponents?

This is not Indonesia's first moratorium on capital punishment. And the practice could easily be reinstated. This may depend on whether the current moratorium is purely motivated by the economy, or whether it is also an indirect response to international condemnation of the most recent executions.

The two factors are possibly related. Foreign investors are more cautious about Indonesia due to the controversy caused by its recent executions of foreign nationals.

Whether Indonesia's new moratorium is genuine or temporary, this is an advocacy moment for Australia to seize.

Human Rights Commission president Gillian Triggs responded to the executions of Australian drug smugglers Andrew Chan and Myuran Sukumaran in Indonesia in April with a call for abolitionist

lobbying across Asia and the Pacific. Triggs noted that the death penalty has been abandoned in New Zealand, Cambodia, Timor Leste, the Philippines, Bhutan and Nepal. De facto moratoriums are operating in Fiji, Thailand and Laos.

Philip Ruddock is chairing a federal parliamentary inquiry into Australia's advocacy for the abolition of the death penalty. Asked whether Indonesia's economic justification for the moratorium might be a strategy to mask its desire to respond to international pressure, he said:

My view is that any change is desirable ... There are a very large number of Indonesians on death row in other countries that [the Indonesians] work hard to have released, so they have an interest in seeing a more just outcome in relation to dealing with these issues around the world.

During his recent visit to Indonesia, Prime Minister Malcolm Turnbull refrained from raising capital punishment. But in line with the parliamentary inquiry's objectives, Turnbull could capitalise on the moratorium by renewing dialogue with Indonesia on the issue.

2. Amy Maguire, 'What more can Australia do to end the death penalty worldwide?', *The Conversation*, 6 October 2015, <https://theconversation.com/what-more-can-australia-do-to-end-the-death-penalty-worldwide-47772>

Foreign Minister Julie Bishop has initiated a parliamentary inquiry into Australia's efforts in campaigning against the death penalty. The Joint Standing Committee on Foreign Affairs, Defence and Trade has sought submissions with regard to:

... reviewing how Australia currently engages internationally to promote abolition of the death penalty, and further steps Australia could take to advocate for worldwide abolition.

This inquiry is a progressive response to the executions of Australians Andrew Chan and Myuran Sukumaran in Indonesia this year. Ideally, it will generate a shift in Australia's global abolitionist efforts.

Australia's legal position on capital punishment

Australian law is unequivocal in its rejection of capital punishment. The last man hanged in Australia was Ronald Ryan in 1967. In 1973, the federal parliament passed legislation prohibiting capital punishment for any federal crime.

In 2010, the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act prohibited capital punishment in all Australian jurisdictions.

Australia has enacted the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Its legal position demonstrates commitment to the global movement to abolish the death penalty. Australia is obliged by international and domestic law to strengthen its advocacy.

Australia's engagement in the abolitionist movement

Australia lobbied firmly for clemency for Sukumaran and Chan. Bishop was particularly strong in her advocacy. Bishop emphasised the men's rehabilitation as a primary justification for sparing their lives.

However, beyond general expressions of "opposition" to capital punishment, Australia did not emphasise specific human rights principles in its lobbying of Indonesia.

Australia's advocacy was genuine but ultimately ineffective. Chan and Sukumaran, along with six others, were put to death by firing squad. Indonesia's position on the death penalty for drug offenders is unchanged. Australia is now stepping back to confront the reality of capital punishment globally.

Strengthening Australia's advocacy

Australia has a very strong legal position in opposition to capital punishment. However, its advocacy position is weaker. It could be fairly said to object loudly to capital punishment only when Australian nationals are subject to it.

Government MP Philip Ruddock acknowledged this when the inquiry was announced:

We need to go beyond an approach where our voice is loudest immediately prior to a planned execution.

Recent reductions in foreign aid could further weaken Australia's advocacy position. If Australia is to influence, it must be seen to contribute. Australia must also aim for consistency in its human rights orientation.

Australia's advocacy for the abolition of capital punishment may be strengthened by reference to human rights principles:

1. Australia must identify the death penalty as a violation of the right to life. This fundamental right is not subject to limitation – it must always be respected.
2. The ICCPR imposes a pragmatic limitation which requires countries to impose capital punishment for only the most serious crimes. It must be unacceptable to Australia that some countries execute people for "crimes" that are either not crimes or not regarded as "most serious" crimes under Australian law.
3. Australia should decry capital punishment as torture. This is both because of the methods used and the length of time convicted persons are kept on death row. Australia must also identify and lobby in cases where torture is used to extract confessions on which death sentences are based. These arguments must be put even to important allies like the US and China. The prohibition on torture is an absolute principle in international law.

Clearly, though, not all countries are receptive to human rights arguments. Australia can also develop its pragmatic position against capital punishment.

The death penalty has and will continue to be imposed on innocent people. This is an even greater risk where a country's justice system is subject to corruption. Australia ought to question whether the inevitable killing of innocents can be justified to preserve the option of capital punishment.

Australia ought also to emphasise that capital punishment has no demonstrated enhanced deterrent value when compared to life imprisonment. The prospect of the death penalty can even be a motivating factor for terror offenders who aspire to martyrdom.

What Australia may achieve

Bolstered by such arguments, Australia can revitalise its role in the global abolitionist movement. A broader-scale advocacy effort would enhance Australia's perceived legitimacy on this issue. Australia could follow the lead of the UK in developing a foreign affairs public strategy aimed at universal abolition.

Former prime minister Tony Abbott was famously dismissive of international human-rights-focused advocacy. However, Malcolm Turnbull may encourage a change in strategy.

Bishop has just announced that Australia will bid for a seat on the UN Human Rights Council in 2018-2020. She sees this as an opportunity for Australia to become:

... a leading advocate for global abolition of the death penalty.

Indonesia reacted defensively to Australia's lobbying for Chan and Sukumaran. If Australia extends its abolitionist advocacy to key allies like China and the US, future lobbying on behalf of Australian nationals may be less likely to be received as attacks.

Australia's recent legal action against Japan over its whaling program demonstrates that positive relationships may be maintained even while one government seeks to persuade its ally to dramatically change policy.

3. Amy Maguire, 'Barbaric and futile: world must do away with state-sponsored killing', *The Conversation UK*, 9 August 2015, <https://theconversation.com/barbaric-and-futile-world-must-do-away-with-state-sponsored-killing-45791>

The execution by firing squad of Australian nationals Andrew Chan and Myuran Sukumaran, in April this year brought the issue of capital punishment to the forefront of Australia's consciousness and reignited debate over the practice on a global scale. The two young men were executed alongside six others in Bali after being convicted of drug offences in Indonesia. In light of this we must ask what sort of crimes – if any – justify state-sanctioned killings.

Public opinion in Australia in relation to the executions was hard to discern. Polls reflected conflicting sentiments on the death penalty. In January 2015, a Roy Morgan poll found 52% supported the penalty for those convicted of drug trafficking overseas. A month later, a conflicting Lowy Institute Poll found 62% of Australian adults opposed the executions of Chan and Sukumaran.

The mixed public opinion in relation to these executions echoed that in evidence when Australians Kevin Barlow and Brian Chambers were hanged in Malaysia in 1986. A historical report from the Australian Institute of Criminology suggested public support for capital punishment at the time ranged from 43% to 70%, depending on the crimes. A national survey in May 1986, however, revealed only 17% supported the death penalty for persons convicted of serious drug trafficking.

Despite the variance in public sentiment, in both cases the Australian government response was strongly stated and in definite opposition to the death penalty. The then prime minister Bob Hawke called the execution of Barlow and Chambers “barbaric”, sparking outrage in Malaysia. The remark drove a wedge between Australia and Malaysia. Relations were only rebuilt after the 2003 retirement of former prime minister Mahathir Mohamad.

In response to the execution of Sukumaran and Chan, Australia’s prime minister, Tony Abbott, and foreign minister, Julie Bishop, labelled the killings “cruel and unnecessary”. Australia’s official response emphasised the men’s rehabilitation during their ten years on death row.

Hours after their deaths were confirmed, Tony Abbott announced the “unprecedented step” of recalling Australia’s ambassador to Indonesia. As many guessed, however, this move was only shortlived. The ambassador returned quietly about five weeks later.

Although ultimately ineffective, there is no doubt Australia lobbied strongly against the death penalty in the case of Chan and Sukumaran. Australia’s response to the executions reflected the official and well-established view that Australia is opposed to capital punishment in law and policy.

Yet the death penalty is imposed thousands of times each year and in many cases Australia and other abolitionist countries do not lobby strongly in protest. At a time when the issue is fresh in the public mind, an examination of the worldwide practice is warranted.

Which countries execute – and why?

Amnesty International reports annually on the imposition of the death penalty globally. It provides only minimum figures, because it only reports figures where reasonable confirmation exists. China, North Korea and some other states treat capital punishment as a state secret. The numbers executed in those states are not reported, although it is estimated that China executes and sentences to death thousands of people each year. Published reports of capital punishment statistics therefore exclude practices in China and North Korea.

In 2014, at least 22 countries carried out the executions of 607 people or more. At least 2,466 people were sentenced to death around the world. The five countries responsible for the most executions, according to confirmed data, were Iran (289), Saudi Arabia (90), Iraq (61), the USA (35) and Sudan (23). In the USA, 3,035 people were living on death row.

The death penalty is imposed in some countries for “crimes” which are not even regarded as such in many other countries. The Cornell University Law School Project Death Penalty Worldwide charts the practice of capital punishment in all retentionist countries. Australian observers of the death penalty are arguably most familiar with the punishment as it has been applied to drug offenders in some

South-East Asian countries. However, in Afghanistan, it is legal for the state to execute a person convicted of apostasy, adultery or consensual homosexual sex. In Iran, the death penalty may be imposed for recidivist theft. In Saudi Arabia, executions are carried out as punishment for “crimes” including sorcery, witchcraft and repeat partaking of alcohol. Although official statistics are unavailable, it is known that China permits capital punishment for serious graft or bribery offences involving large sums of money.

In 2014, executions were carried out in various countries by beheading, hanging, lethal injection and shooting. In the United Arab Emirates it is legal to execute by stoning. In 2014 all executions in the US were carried out by lethal injection – but some states retain other methods as legal options, including hanging, shooting, the gas chamber and the electric chair.

Amnesty International is currently campaigning to prevent the execution of people with mental or intellectual disabilities. Capital punishment continues to be imposed against people who lack the capacity to adequately understand their actions or punishment.

In January this year, the US states of Texas and Georgia executed intellectually disabled men. This contravened federal court bans on imposing the death penalty in such cases. Texas defines intellectual disability in relation to a character in the John Steinbeck novel *Of Mice and Men* rather than according to the standards set by medical science.

Globally, and notably in the USA, the death penalty is also imposed disproportionately against the poor and those from minority racial and ethnic groups. In violation of international law, Egypt, Iran, Sri Lanka, Maldives, Nigeria, Pakistan, Saudi Arabia, Yemen and other countries continue to execute juveniles.

Barbaric and ineffective

Even the most pragmatic analysis must reject the death penalty as ineffectual and unreliable. In the US since 1973, more than 150 death row inmates have been exonerated, often based on DNA evidence. There is no evidence that capital punishment is any more effective at deterring crime than life imprisonment.

States that carry out capital punishment debase their justice systems and devalue human life. The practice is indefensible regardless of the severity of the crime for which it is meted out. When imposed against the mentally ill, intellectually disabled people or children - or disproportionately against racial minorities and the poor - capital punishment is barbaric. Abolitionist countries are obliged to lobby against the practice, whether or not it affects their nationals.

4. Amy Maguire, 'Time to halt death penalty', *The Newcastle Herald*, 1 May 2015, <http://www.theherald.com.au/story/3050303/opinion-time-to-halt-death-penalty/>

ON April 29, 2015, Australian citizens Andrew Chan and Myuran Sukumaran were executed by firing squad in Indonesia. Five other foreign nationals and one Indonesian were also put to death. The executions were carried out despite strong and consistent advocacy on the part of the Australian

government. In executing Chan and Sukumaran, Indonesia violated its own rule of law, by preventing two separate courts from hearing legal claims due to be raised in coming weeks.

Australia's advocacy was led admirably by Foreign Minister Julie Bishop. She and others in government emphasised the rehabilitation of Sukumaran, who had become an accomplished artist in prison, and Chan, who was recently ordained as a Christian minister. Both men are said to have bettered the lives and circumstances of many of their fellow prisoners through outreach efforts.

In response to the executions, Australia has withdrawn its Ambassador to Indonesia and suspended ministerial contact. Indonesia has responded that these measures will be merely temporary signs of protest on Australia's part. No doubt this is an accurate assessment, and Australia's initial response may have little long-term significance.

How else, and how better, can Australia respond? The answer is through consistent, constant and principled advocacy against the death penalty globally.

There are three key arguments against capital punishment based in international human rights law:

Right to life: The right to life is the foundation principle of the Universal Declaration of Human Rights, and the legal framework that has been built around it. States are never permitted to derogate from the right to life, because human life is of the utmost value. In carrying out death sentences, states violate the right to life.

The death penalty is only to be imposed for the most serious of crimes: The International Covenant on Civil and Political Rights (ICCPR) acknowledges that some states continue to impose capital punishment, despite the fact that this violates the right to life. The ICCPR obliges those states to only impose capital punishment for the most serious of crimes (like intentional murder). The executions of Sukumaran and Chan violated this subsidiary protection. Elsewhere in the world, we see states executing people for actions which would not even be regarded as crimes in Australian society.

Prohibition on torture: Torture is always prohibited by international law. Yet the death penalty is torturous. Not only does capital punishment inflict pain and suffering at the time of execution, but it imposes years of mental anguish on death row inmates. Capital punishment also inflicts terrible suffering on the families and loved ones of those sentenced to death.

These arguments reflect the immutable value of human life.

Yet some people do not find human rights arguments persuasive, and instead argue that people facing execution overseas should be left to their "just deserts". Indeed, the Australian government rarely advanced human rights arguments in seeking clemency for Sukumaran and Chan. Australia focused instead on their rehabilitation.

There are several strong pragmatic arguments against capital punishment:

Human justice is fallible: Judges and juries can make mistakes, but capital punishment is irreversible. In the United States since 1973, 150 people have been exonerated after being sent to death row. The practice of capital punishment risks the killing of innocent people.

The death penalty is no more effective a deterrent than imprisonment: Indonesian President Joko Widodo argues for the death penalty to deter drug traffickers, but cannot present evidence to demonstrate that it is any more effective a deterrent than imprisonment would be. If it is possible to deter crime through imprisonment, then this form of punishment saves the state from inhumanity.

Capital punishment is a form of revenge: It may be natural for human beings to wish for revenge when they are wronged. We give power over trials and punishments to our courts, because we recognise the need for a justice system that can set its sights above retribution. A forward-looking criminal justice system seeks to promote restorative justice, repentance, reform and rehabilitation of offenders.

The Australian government has strongly condemned the execution of two of its citizens in Indonesia. The challenge now is to craft a long-standing and fruitful response to their deaths. Australia can take on a position of ethical strength by broadening its advocacy. We should oppose the execution of human beings by the state wherever it is done, and whoever is subject to it.

5. Amy Maguire, 'Hard line on refugees undermines principled opposition to execution', *The Conversation*, 30 April 2015, <https://theconversation.com/hard-line-on-refugees-undermines-principled-opposition-to-execution-40953>

Yesterday morning, Prime Minister Tony Abbott announced the “unprecedented step” of recalling Australia’s ambassador to Indonesia. He also suspended all ministerial contact in response to the executions of Australian citizens Andrew Chan and Myuran Sukumaran. Australia has undertaken “an international commitment to abolish the death penalty” as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

Yet the same legal instrument that enshrines the right to life, the ICCPR, is also the basis on which Australia has been condemned internationally for its treatment of asylum seekers. The Abbott government has bluntly rejected these criticisms by the United Nations and human rights bodies, including Australia’s own Human Rights Commission.

Australia has incorporated its commitment to the ICCPR into domestic law. Capital punishment is outlawed in all Australian jurisdictions. Australia will not extradite persons to countries where they may face capital punishment.

Australia lobbied Indonesia for presidential clemency partly on the basis that Chan and Sukumaran had been rehabilitated. Their reform has been credited as a success story of the Indonesian prison system.

Australia also relied on other legal and humanitarian principles in advancing human rights arguments against the executions. Foreign Minister Julie Bishop described the sentence as a “grave injustice”. She noted Australia’s “strong opposition to the death penalty at home and abroad”.

Opposition Leader Bill Shorten and his deputy, shadow foreign affairs minister Tanya Plibersek, condemned the death penalty as barbaric and argued that its practice “diminishes us all”. They

said the executions undermined the rule of law because the Indonesian courts were yet to hear new appeals from the Australian pair.

Australian appeals hampered by hypocrisy

While Australia condemns capital punishment as a grave violation of human rights, it blatantly violates the rights of asylum seekers and refugees.

The ICCPR prohibits arbitrary detention, torture, cruel, inhuman or degrading treatment. It protects the right to recognition of personhood under law. As the UN Human Rights Commissioner has specifically noted, these provisions are violated by Australia's boats "turn back" policy and the mandatory detention of asylum seekers in Australia and offshore.

The flouting of human rights standards in relation to child asylum seekers is particularly reprehensible. Australia violates its particular obligations to children under the Convention on the Rights of the Child. The government was particularly aggressive in rejecting recent findings on these matters.

The government has also dismissed international condemnation. In response to the March 2015 UN finding that Australia's treatment of asylum seekers amounted to torture, Abbott said:

I really think Australians are sick of being lectured to by the United Nations.

The politics of managing opinion and principle

Australia's contrasting approaches to capital punishment and the treatment of asylum seekers raise questions about our commitment to human rights and the international body of law that exists to protect these. Does the Australian voting public demand the strongest advocacy to pardon our citizens facing capital punishment abroad? Do these voters simultaneously support the denial of human rights to asylum seekers?

Some polling suggests many Australians are unsympathetic to the plight of Chan, Sukumaran and others who might face a similar fate. A 2009 poll found a clear majority preferred imprisonment to capital punishment as a penalty in Australian murder trials. However, 53% of those polled said death sentences against drug offenders in Southeast Asia should be carried out. A 2015 poll showed 52% supported the death penalty in those circumstances.

A contrasting poll found that 62% of Australian adults opposed the executions of Chan and Sukumaran. So it is clear that gauging public opinion on capital punishment is complex.

It is also clear that the government's advocacy for Chan and Sukumaran rejected the strain of public opinion that would leave the men to their "just deserts". Indeed, Bishop questioned the accuracy of the poll finding that a majority thought the executions should proceed.

In taking a principled stand in this case, Australia has sought to care for its own citizens. This is starkly at odds with the weight of political activity and public opinion on asylum seekers who attempt to reach Australia by boat. These people are decried as "queue jumpers" and "illegal maritime arrivals" despite the right to seek asylum being enshrined in international law.

How do we gain legitimacy for human rights advocacy?

The international human rights framework rests on principles of the universality and indivisibility of these rights. If we deny the rights of some human beings, we lose authority when arguing for the rights of others.

Australia has campaigned for the rights of convicted offenders (rehabilitated though they were), while denying the rights of asylum seekers. Under international law, it is a right and not a crime to flee from persecution and seek asylum elsewhere. Both Indonesia and Australia have ignored pleas for compassion.

Australia should seek a position of utmost legitimacy, to make it impossible for other states to accuse us of hypocrisy and ignore our appeals. Australia must aim to be a consistent global leader in human rights. To achieve this, we must address the violations of human rights committed in our own name.

With the executions of its citizens, Australia has been wronged. We can respond with diplomatic complaints or calls for the withdrawal of aid to Indonesia. Or we can seize this tragic moment as an opportunity to demand the end of capital punishment worldwide.

To do so effectively, we must assert the primacy of human life by valuing all lives and upholding the rights accorded equally to all people.