

Death penalty not an option

By Professor Donald R. Rothwell

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Canberra must pursue every legal avenue regarding the Bali Nine, writes Donald Rothwell.

The Bali Nine present both opportunities and challenges.

THE decision of the Indonesian Supreme Court last month that six of the Bali Nine now possibly face the firing squad has come as a shock.

It is rare for an appeals court to upgrade sentences imposed at trial to death. However, the Indonesian appeal courts do have the capacity to hear both the defence and prosecution as to the appropriateness of the sentence.

In cases of drug trafficking the death penalty is one of the options open to the courts and so it was always a possibility that life sentences could be increased to death. Chan, Sukumaran, Chen, Nguyen, Norman, and Rush now have the option to seek judicial review of their cases. Inconsistencies in decision-making and legal irregularities can be raised at this stage.

That the Supreme Court has not distinguished between the so-called drug mules and their leaders Chan and Sukumaran will clearly be one ground of appeal. Another will be that Scott Rush in particular is now facing death while the other mules detained at the airport have term sentences of life or 20 years.

If some of these appeals fail, which given the tough stance taken by the Indonesian courts towards drug trafficking seems likely, the Australian Government will then be placed in a tough position. At this time the Government will have a legal capacity to seek to intervene on behalf of those Australians on death row. It can make official representations requesting clemency or begin legal action in order to halt the executions.

Notwithstanding its own tough position on drugs and support for the Australian Federal Police in the Bali operation, the Government has been vocal in its opposition towards the death penalty.

As Foreign Minister Alexander Downer recently noted in Parliament: "We oppose capital punishment and we always support applications for clemency for Australians". The Howard Government has a track record of making these applications. While its representations to Singapore last year in the case of Van Nguyen failed, in February it did succeed with clemency pleas for two Australians on death row in Vietnam.

Lobbying on behalf of the Bali Nine has already commenced with Downer having indicated as early as December last year that the Government had begun raising their cases with Indonesian counterparts.

Australia's most experienced Jakarta diplomat, Richard Woolcott, has emphasised the importance of quiet diplomacy when dealing with Indonesia and this will be a factor. The Prime Minister is right to have dismissed calls for his personal intervention in making direct requests for clemency to President Yudhoyono. Now is not the time for such an intervention both politically and legally.

However, notwithstanding its success with the Vietnamese cases, the Government must reflect upon its failure in the Van Nguyen case to win clemency and consider both its diplomatic and legal tactics. Diplomatically, making a formal government-to-government request for clemency in the Bali Nine cases will present both opportunities and challenges.

Notwithstanding the fallout over the granting of protection visas to West Papuan asylum seekers, Australia retains a strong bilateral relationship with Indonesia. This has been boosted in recent years through the close co-operation in law enforcement and counter-terrorism, and through Australia's humanitarian aid package following the 2004 tsunami. That the Government has also been careful to restate its support in principle for Indonesia's tough stance on drug trafficking removes any potential for disagreement over the general thrust of Indonesia's law, and narrows the focus on the death penalty. Australia would not be seeking the release of the Bali Nine, but that final death sentences be commuted to life terms.

Unlike the Van Nguyen case, this is not an instance of a mandatory imposition of the death penalty. Australia can point to Indonesia having recently become a party to the International Covenant on Civil and Political Rights. As one of the few South-East Asian states to be a party to a major human rights treaty, Australia can seek to gently remind Indonesia of its obligations to respect human rights. Though the Covenant does not directly prohibit the death penalty, it is clearly not within the spirit of the law.

Other legal options will be available, including exploring dispute resolution under the Treaty of Amity and Co-operation which Australia joined last year in order to secure an invitation to the ASEAN forum.

An important lesson from the Van Nguyen case was placing too much faith in diplomacy and giving insufficient attention to legal arguments. .

Diplomatic options should be actively pursued, but when the lives of Australians are at stake, no matter what their crimes the Government needs to pursue fully every option available to it, including appropriate legal arguments.

If not, our opposition to the death penalty remains hollow.

Donald R. Rothwell is Professor of International Law at the ANU College of Law, and was an international legal adviser in the Van Nguyen case

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