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**How our police erred on the side of capital punishment**  
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LAST week, the Indonesian Supreme Court increased the sentences of four of the so-called Bali Nine from 20 years to death. Responding to Australians' expressions of surprise and shock, the Prime Minister, John Howard, promised to appeal for clemency on their behalf - though only when all possible legal appeals have been exhausted.

The outcome in the Indonesian Supreme Court has refocused attention on the case of *Rush v Commissioner of Police*, decided in the Federal Court of Australia in January. In *Rush*, the broad issue was the legality of the actions of the Australian Federal Police. It involved four of the Bali Nine seeking discovery of the identity of the officers who had passed on information about the activities of the four drug couriers to the Indonesian National Police.

The four also sought to discover information about AFP documents relating to operational and other decisions leading to their arrest. The applications were unsuccessful. Justice Finn, dismissed them on the grounds that there were no reasonable prospects of the four successfully suing the AFP for their actions in exposing them to the risk of the death penalty in Indonesia.

At the time of the decision, the Government and sections of the media touted Justice Finn's judgment as a vindication of AFP actions; a finding that the AFP had acted lawfully, appropriately and properly throughout its cooperation with the INP. The leading cheerleader for this view at the time was Chris Ellison, Minister for Justice and Customs. Senator Ellison repeated those sentiments on the ABC television program *The Insiders* on Sunday.

What is disturbing both about the statements of the minister and the assurances of the Prime Minister is their continuing failure to look beyond Justice Finn's decision on the legal issues to his criticisms of existing procedure and policy.

Whilst Justice Finn did, indeed, find AFP actions to have been lawful, he clearly stated that the circumstances of the Bali Nine revealed that there was a need for the Minister for Justice and the Commissioner of Police to "address the procedures and protocols" followed by members of the AFP when sharing information with overseas police forces in circumstances which predictably could result in the charging of a person for an offence carrying the death penalty.

Capital punishment was abolished in this country in 1973 and, as a result, our mutual assistance legislation enables the attorney-general to refuse a foreign country's request for assistance in relation to the prosecution or punishment of a person for an offence for which the death penalty could be imposed. However, this legislation applies at the post-charge or prosecution stage and where assistance is sought by another government in relation to an exercise of coercive powers.

On the other hand, at the investigation stage where our police force is essentially sharing information with foreign police forces, the Rush case reveals that the AFP has a high degree of discretion in how it engages in international cooperation.

Few would dispute that there is a need for transnational policing in an era of global crime. In Australia, global policing is government policy.

In August 2004, Senator Ellison directed the AFP to actively foster relationships with foreign police forces in the fight against transnational crime, telling them to be "active in pursuing opportunities for cooperation and strategic alliances with international partners in law enforcement, to support effective action against multi-jurisdictional crime".

Whilst the commissioner is obliged to follow such directions, and to issue consistent internal guidelines for his officers, so long as he is not acting contrary to the AFP Act, he has a discretion with respect to operational matters and administrative directions.

This allows the commissioner to enter into agreements with foreign police forces in relation to how they will cooperate. These agreements take the form of "memoranda of understanding" signed by the AFP commissioner and his foreign counterpart. Commissioner Mick Keelty signed just such an MoU with Police General Da'i Bachtiar of the INP on June 13, 2003.

The contents of that MoU are not public. Indeed, Commissioner Keelty did not produce the document for the Federal Court in the Rush case on, among other things, public interest grounds. So we do not know the nature of the cooperative relationship that has been agreed to between the two police forces in question.

The AFP has similar agreements with a number of countries in our region, including Thailand and China (which accounted for more executions than any other country in the world in 2005). None of these are public documents.

Nor do we know the contents of the MoUs that Commissioner Keelty has signed in recent months between the AFP and both the Japanese and Vietnamese national police forces. Interestingly, Vietnam is another jurisdiction with the death penalty for a broad range of crimes, including drug trafficking.

If we are going to accept both the level of discretion enjoyed by the AFP in its dealings with foreign police forces and the lack of transparency in its agreements with those forces, we can hardly be shocked by Australian citizens being exposed to the death penalty abroad.

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