

not 'embroil [themselves] in ongoing scientific controversies beyond their expertise... Accordingly an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain.<sup>6</sup>

Justice Stephen Breyer (with whom Justice Ruth Bader Ginsburg agreed) held that 'the death penalty, in and out of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment''. He stated:

The imposition and implementation of the death penalty seems capricious, random, indeed arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?<sup>7</sup>

## Interview with Julian McMahon

**Australians were confronted by the death penalty when Andrew Chan and Myuran Sukumaran were executed in Indonesia on 29 April 2015. Once again the arguments in favour of and against the death penalty were debated in the media and no doubt privately by many Australians. Carolyn Dobraszczyk spoke to Julian McMahon who is a barrister at the Victorian Bar, and who was one of the main Australian lawyers who acted for the two Australians.**

**Julian McMahon:** Sukumaran and Chan were arrested on 17 April 2005; they were sentenced to death on 14 February 2006; again in April; and again in August or early September 2006. In September, Lex Lasry QC who is now a Supreme Court Judge, and I were heading to Indonesia, having just been asked by the families to help. Our first job was to identify local lawyers. We have worked on cases in a number of countries and we always retain a local lawyer to run the case in court.... sometimes that is obligatory, and, even if it is not obligatory, it's generally a better idea than trying to get in as some kind of outsider and all of the problems that generates.

We need a local lawyer who is happy to work on behalf of our client and to work with the assistance of the Australian lawyers. These days we have a team, about eight of us, who work together as a group or in smaller numbers, and what we do is try to provide support to the local lawyer. That support would typically be similar to the role of junior counsel in a large brief on whom much reliance is placed, where senior counsel, whom we would call our local lawyer, is really asking junior

There is no doubt that this topic presents even more challenging issues than ever before and is still one of the most hotly debated areas of law.

### Endnotes

1. From Wikipedia, 'Eighth Amendment to the United States Constitution'.
2. From Brief of the Petitioners filed on 9 March 2015-[www.scotusblog.com/case-files/cases/glossip-v-gloss](http://www.scotusblog.com/case-files/cases/glossip-v-gloss).
3. From [www.vox.com](http://www.vox.com) 'What you need to know before the Supreme Court's death penalty ruling' Dara Lind.
4. 'The Cruel and unusual execution of Clayton Lockett' by Jeffrey Stern, *The Atlantic*, June 2015 issue.
5. [SCOTUSblog.com/2015/04/justices-debate-lethal-injection-and-the-death-penalty-in-plain-english](http://SCOTUSblog.com/2015/04/justices-debate-lethal-injection-and-the-death-penalty-in-plain-english) by Amy Howe.
6. *Glossip v Gloss* 576 US (2015) at 1-2; 17-18.
7. from [www.slate.com/blogs](http://www.slate.com/blogs) 'In a Brave, Powerful Dissent, Justice Breyer Calls for the Abolition of the Death Penalty' by Mark Joseph Stern.



Photo: Kate Geraghty / Fairfax

counsel, 'what do you see as being the issues; is there other law around the world which can help us; have you analysed the brief; where can we go with these ideas?' Our job is to approach the case with a view to providing as much support as possible to the local lawyer.

In the case of Sukumaran and Chan, I asked friends and colleagues in a number of countries, around the world actually, who would be the best lawyer in Indonesia to work for my clients in circumstances where they had already been sentenced to death three times and I was given one name ahead of all the others constantly which was Todung Mulya Lubis, who runs a very successful commercial law firm – but like some of our Silks in Australia, and some commercial firms, he also has a human rights side to his life...and his career. He is internationally educated, an extremely competent lawyer and is briefed by the largest corporations in the world when they have problems in Indonesia. He is also famous for being scrupulously honest... He is a person whom I regard as being of great courage and integrity.

In 2007 the Indonesian lawyers ran a case in the Constitutional Court on the question of whether executions breached the Constitution, which had some important human rights provisions. After the fall of Suharto there was a period in Indonesia known as Reformasi and one of the developments early in this century was the significant amendments to the Indonesian Constitution. Indonesia adopted and placed within the Constitution important parts of the ICCPR (the International Covenant on Civil and Political Rights).

Also in 2005 Indonesia actually adopted the ICCPR domestic legislation, so the ground was fertile to challenge the death penalty. The Indonesian lawyers ran a very large case in 2007. They brought in experts from around the world, including Professor William Schabas who is one of the two leading world experts. The other is Professor Hood, he was unavailable. There were experts from America, United Nations and so on. The Constitutional Court was very pleased to have all of these experts because it meant that there were good hearings with really the most qualified people in the world to talk about the death penalty, international law, the United Nations, human rights, and so on.

What happened was the court was divided on a 5:4 basis in favour of retaining the death penalty. The chief justice was one of the minority, however he voted with the majority so it became 6:3. He later said that he felt it was his role as the chief justice, to decide with the majority so the final ruling was 6:3 not 5:4. The case came very close to abolishing the death penalty. The Indonesian lawyers then ran an appeal in the Supreme Court. I should explain that Indonesia has a court hierarchy which resembles the Australian pyramid structure but outside that structure it also has a Constitutional Court. There is a strange co-existence at the peak of the legal structure...the Constitutional Court and the Supreme Court. The two courts don't sit together and deal with different issues. Sometimes they contradict each other.

Sometimes the various courts welcomed the Australian lawyers and made arrangements for us and sometimes they ignored us. But we were never made to feel unwelcome and at all times, virtually at every occasion we were allowed to be present. We would usually sit near or behind the bar table. There were a couple of things that happened in chambers over the years which understandably we weren't invited to, that was all fine.

**Bar News: Could you and the Australian lawyers remain as the researchers in relation to all of arguments or did the Indonesian lawyer do a lot of it himself?**

**JM:** The Indonesian lawyer and his firm are eminent lawyers,

they certainly could have managed all of this on their own. Like any group of hard working, good lawyers any work was welcomed by the other so essentially every document that came to exist had a fusion of the work of quite a few lawyers working in harmony, but the final decision on everything resides with the Indonesian lawyers. Within the group of Australian lawyers we had counsel who have appeared or worked at the Hague or other countries and have lots of relevant experience so we were able to contribute.

**Bar News: Were there a lot of written documents prepared?**

**JM:** Absolutely, the Constitutional Court case, as an example, was very substantial. I think the documents would be similar in length to any major litigation in Australia. The Constitutional Court decision was 450 pages. There was a lot of hard work.

**Bar News: Are there any particular laws/procedural issues, that lawyers have to know in order to do these cases?**

**JM:** I have worked in a number of very different jurisdictions now and what has surprised me really was the value of our training and education in law. Sometimes you have to learn things that are completely new but once you have trained in our legal jurisdiction it is not that hard to move into another one, certainly as an assistant or adjunct person...you might not want to be the front man or woman but you can certainly provide value...

**Bar News: Skills needed?**

**JM:** For every jurisdiction that we have worked in, the critical law is found within three or four pieces of legislation and the Constitution... going by whatever name, i.e. the Crimes Act, the Evidence Act, the Procedure Act, whatever they are called in that particular country, you start with those and then you also rely upon international law. Basically, once you know how to analyse evidence and apply principles and law you can do this in any jurisdiction. Those skills are very transportable. In the case of Sukumaran and Chan, at no time has there ever been a judgment which finally dealt with the merits of the clemency application. Indeed no Court has dealt with most of the merits of the legal argument put as to why there should be a lesser penalty than the death penalty. When the Indonesian lawyers went to the Administrative Court to review the apparent failure of the president to even read the documents ....jurisdiction was denied. When they went to appeal this decision, the same problem was identified. The Administrative Court said it was a constitutional matter. The Indonesian lawyers went to the Constitutional Court and prior to that coming on in the Constitutional Court, our clients were executed.