

Australia and the death penalty

Are we really against it?

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Edited version of lecture given by Lex Lasry QC, Monash University Costello Lecture, 29 March 2006.

One effect of Van Nguyen's execution in December 2005 in Singapore was that a Sydney drug trafficker was put beyond the reach of the law for the offence of conspiracy to import heroin into Australia, for which he procured Van Nguyen to commit and from which he would take the profit.

That always seemed to me to be a good reason to oppose the death penalty: often a death penalty results in other guilty people going free.

The campaign that preceded Van's execution raised the profile of the death penalty debate in this country and, to some extent, in the South East Asian region. The important issue now is the role and stand that Australia should take in such a debate. The problem is that our government sees the principle of opposition to the death penalty as flexible. It should not be.

One of my ambitions after the Van Nguyen case was to pressure the federal government into adopting a firm and uniform policy on the death penalty. I mean that Australia should be against the death penalty in all circumstances. We are against it as a matter of principle. And the highly complicated main principle involved? Democratic governments should not kill people.

"Death penalty" does not convey the practical reality. The death of the prisoner is always preceded by months or years on death row, wondering whether tomorrow will be "The Day". And then there are the final farewells where one looks into the eyes of a healthy young man or woman in the knowledge that by the next day, that person will be dead.

And then the methods:

- hanging, which can take as long as nine minutes before death occurs, is sometimes accompanied by asphyxiation or decapitation;
- lethal injection (in the US this usually takes place in front of an audience), where mistakes can happen;
- shooting, where, in Indonesia for example, if the one member of the squad with a live round in his gun misses the heart of the condemned person, the squad leader must finish that person with a pistol shot to the head.

There is also the possibility of judicial error.

Australia at the federal level is governed by a very pragmatic group of conservatives. The Prime Minister is regularly admired for his capacity to "read the electorate". He characterises his relationship with the Australian people as in the nature of a "conversation".

I worry about that "conversation" because on this issue it is less about leadership and more about pragmatism. I worry about it because I suspect that, in truth, many of those who are for the death penalty are for vengeance. I say that because there is much evidence to indicate that the death penalty is not an effective deterrent.

The death penalty has been abolished in Australia since the 1970s. No-one suggests that the rate at which crimes which attracted that penalty has increased since. In 1915 in Australia, the homicide rate was 1.8 per 100,000 population. In 1998 it was 1.6 per 100,000. During the intervening years it hit a low of 0.8 in 1941 and a high of 2.4 in 1988.¹

If it be the case that there is no deterrent value of the death penalty, then one is left with retribution, and living as we do in a society said to be dominated by Christian ethics and led by politicians with religious convictions, how can there be any reason to consider the re-introduction of an antiquated and grotesque form of punishment?

Australia has taken two significant steps in relation to the death penalty to demonstrate that, as a country, we are opposed to it as an appropriate criminal sanction in a civilised society:

- (1) In 1973 the Commonwealth Parliament passed one of the shortest Acts in its history, the *Death Penalty Abolition Act 1973* (Cth). Section 4 of that Act provides that "a person is not liable to the punishment of death for any offence."
- (2) In 1990 Australia ratified the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* (SOP).² The SOP has now been ratified by 57 nation states.

The preamble to the SOP expresses important statements of principle:

- (1) that the states parties "believ[e] that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights"; and



Van Nguyen vigil.

- (2) that states parties, including Australia, are “desirous to undertake hereby an international commitment to abolish the death penalty”.

There are then 11 articles of agreement which require the states parties to abolish the death penalty within their jurisdictions which, of course, Australia has already done.

So Australia is signatory to a UN Protocol in which it undertakes an international commitment to abolish the death penalty. Is Australia supporting the spirit of the SOP and are we having an effect in dissuading other countries from executing their citizens or non-citizens?

There are very good reasons why Australia should lead on this issue. In some countries (for example, Iran, Yemen, China and Congo) children have been executed. As we have recently seen, apostasy can attract a capital penalty. In some countries homosexuals also risk execution. In the US it is estimated that some 90% of those sentenced to death are indigent.

The Australian government has always expressed its opposition to the killing of Australian citizens. The support and genuine concern on the part of the current government for Van Nguyen in Singapore was never in doubt.

However, if the Australian position on the death penalty is not an equal position of opposition in all circumstances, then its commitment to the SOP is compromised.

Let us look at some recent events, starting with the outrage over the September 11 attacks on the US. In

March 2003, both Prime Minister Howard and Foreign Minister Downer said they would support the death penalty for Osama bin Laden. Mr Howard, speaking to Fox News, basically trashed Australia's anti-death penalty policy. Mr Downer, with respect, showed the classic misunderstanding of the difference between the particular case and the principle when he said, “I personally have never supported the death penalty but in the case of Osama bin Laden, I don't think that too many tears would be shed if he was executed, bearing in mind all the people he's responsible for killing.”

So, it's OK to execute some people. It's the criminal, not the principle that matters.

One of the most damaging statements to the spirit of the SOP was when Mr Howard (*The Age*, 8 August 2003), referring to Bali bomber Amrozi, said that “it will not be the intention of the Australian government to make any representations to the government of Indonesia that that [death] penalty not be carried out. If it is the view of the Indonesian court that it be carried out, then it should be carried out and the law of that country must prevail.”

Prevail over what? The internationally-agreed SOP?

On the following day the Prime Minister was quoted by the *Sydney Morning Herald* as having, on Melbourne radio, called for a debate on the reintroduction of the death penalty. On 15 December 2003, the issue arose again, this time in relation to Saddam Hussein. Mr Howard was reported as saying he supported the death penalty for Iraqi dictator Saddam Hussein.

This stance is not exactly consistent with Australia's commitment to the SOP. What do politicians think these covenants exist for?

Yet on 24 March 2006 Mr Howard took a different tack over what was happening in Afghanistan, when the ABC reported that a man in Afghanistan was on trial for converting from Islam to Christianity, with a possible death sentence if found guilty. Mr Howard said he would write to President Hamid Karzai to express his unhappiness.

"It's an appalling thing, that we are fighting, we are putting the lives of Australian soldiers on the line and this sort of thing is allowed, I mean this is outrageous," Mr Howard said.

The effect of these kinds of public statements by the leader of the country is to send a message that Australia's position is not inflexible.

There are two Australians in Bali facing a firing squad as part of the prosecution of the Bali 9. With Van Nguyen having had his effect on the debate, and with the principles to which Australia is meant to adhere in mind, Mr Howard's reply to John Laws' question (Sydney radio, 15 February 2006), as to whether the laws of Indonesia are too severe, is revealing:

"Well, that's for them to decide, it's not for me, I have no right to decide the penalties of another country . . . this idea that we can sit back and make a judgment and . . . if something goes wrong then the government will go in and persuade these countries to change their laws, it's fairyland stuff."

His answer to the question should have been, "Yes, by the standards to which we subscribe, they are too severe. We are opposed to the death penalty in all circumstances."

So what does all this mean? Why is it important? It is obvious. Australia would regard itself as a leader in the Asian region where countries like Japan, China, Malaysia, Singapore, Indonesia, Korea, Vietnam and Thailand all have a death penalty. We are a country which aspires to a leadership role in relation to human rights and democratic values, those kinds of broad principles that have underpinned many international roles for our country.

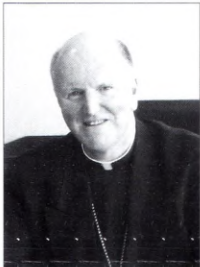
In addition, Australia has been a significant supporter of the UN. In 2002, for example, despite the unwillingness of the US to do so, Australia ratified the *Rome Treaty* establishing the International Criminal Court, a jurisdiction which has no place for the death penalty.

The Australian government must understand that a hot and cold approach to the death penalty, depending on whether the person is an Australian, or the nature of the offence, or on the government's measure of the public mood, completely dilutes our standing on the issue.

It means that we cannot lead and cannot have a significant effect of the kind we have signed up to under the SOP. Australia must declare internationally that it is firmly against the death penalty in all circumstances, regardless of the person involved or the offence that person has committed.

As a Young Lawyer in Australia, do you think the federal government must declare internationally that it is firmly opposed to the death penalty, regardless of the person involved or crime committed? Email fiona.batten@bakernet.com or ajarvis@hgr.com.au

1. www.abs.gov.au
2. Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.



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