



Law Council
OF AUSTRALIA

The legal profession's views on abolition of the death penalty advocacy

Speech delivered by Fiona McLeod SC, President, Law Council of Australia at the Death Penalty Symposium, Melbourne.

3 February 2017

Welcome

Welcome everyone and thank you all for being here to contribute to what promises to be a thought-provoking day.

I acknowledge the Traditional Owners of the land on which we are gathered and pay respect to Elders, past, present and future.

I recognise the interest of many of our first peoples in our journey towards abolition - and recognise their suffering as a result of brutality sanctioned by the law and those in authority.

May I note the apologies of the Foreign Minister Julie Bishop and the Shadow Minister for Foreign Affairs Penny Wong. I acknowledge the presence of:

- Tim Wilson MP, Federal Member for Goldstein;
- The Hon. Mark Dreyfus QC MP, Shadow Attorney-General;
- The Hon. Philip Ruddock, Special Envoy for Human Rights and Former Minister;
- Gillian Triggs, President of the Australian Human Rights Commission;
- The Hon. Dr Barry Jones AC, Former Federal Minister for Science;
- Michael Phelan APM, Deputy Commissioner, Australian Federal Police;
- Christopher Holtby OBE, Consul-General, British Consulate (Melbourne);
- Dr Bruno Scholl, Counsellor and Head of Political and Public Diplomacy, Delegation of the EU to Australia;
- Julian McMahon, President of Reprieve Australia;
- Morry Bailes, President-elect of the Law Council;
- Sarah Pritchard SC, Chair of the Law Council Human Rights Committee;
- Will Alstergren QC, President of the Australian Bar Association;
- Pauline Wright, President of the Law Society of NSW and others from the Law Council family;
- VIP's; and
- Professor Bryan Horrigan, Dean of Monash Law and Professor Sarah Joseph of the Castan Centre.

I sincerely thank our hosts for today's event, Monash University, who have been extremely generous with their facilities and resources.

And I thank the Castan Centre for Human Rights Law, here at Monash, and Reprieve Australia for their vital support of this event.

I acknowledge the presence of Lee and Christine Rush, who travelled to join us here today.

I acknowledge the continued efforts of government including the Foreign Minister and Attorney-General and officials within their Departments and their commitment to this cause and efforts to secure clemency for Australians facing the death penalty abroad.

I acknowledge the extraordinary and courageous effort of the legal profession appearing and acting for those facing capital punishment.

Philip Opas, Allayne Kiddle, Brian Bourke, Julian McMahon, Lex Lasry, Peter Morrissey, Mick O'Connell, Felicity Gerry, Christopher Ward, John Champion, Mark Taft, Tony Trood, Megan Tittensor, Scott Jones and solicitors Veronica Haccou, Alex Wilson and Joel Backwell amongst others.

Commemoration

At 8am I stood in silence with a small group outside the bluestone walls of Pentridge Prison. Although the inside of the prison has been renovated and now houses many modern homes, 50 years ago the walls held men condemned to die.

One of those men was Ronald Ryan. In the jail with him were a number of other men to carry out his execution, or to observe it as required by law.

In their chambers or law offices his counsel and solicitors sat waiting for a last minute reprieve that never came. On the steps of Parliament House a group of university students held an all-night vigil in protest, hoping by their action to move the Premier to intervene.

All involved in this execution - as participants authorised by law, as witnesses or as advocates for clemency - were moved by their role in the putting to death of a man. Some so traumatised they cannot speak of it to this day without experiencing a profound grief.

Since that time six Australians have been executed abroad.

Kevin Barlow, Brian Chambers and Michael McAuliffe in Malaysia, Van Tuong Nguyen in Singapore, and Andrew Chan and Myuran Sukumaran in Indonesia.

The death of each man has left a shadow upon the lives of many. And worldwide over 600 people are executed every year.

Impact

I would like to share with you a short clip from the film 'Guilty' made by Australian production company Savage Films, here filming today, and supported by Good Pitch Australia.

It contains remarkable interviews and footage documenting the last days of Andrew Chan and Myuran Sukumaran, and it examines the impact of their lives and execution.

These images and these lives are still raw, a potent reminder of why we must continue to support the cause of abolition throughout the world. To work, as we can, supported by government, to persuade the governments of those 56 countries that they can dispense justice and find just outcomes without killing.

Execution by the state is an affront to human rights and is in all circumstances, cruel and excessive punishment. There is no kind way to kill.

It is an ineffective deterrent to criminal offending. It is incapable of responding appropriately to the rehabilitation or the special vulnerability or impairment of individuals.

It permits no correction of errors in the judicial process. And it punishes all those connected with it.

There were 11 official witnesses to Ryan's hanging on this day, 50 years ago.

Among them was Brian Moreley, a journalist so affected by the events of that day that he was still able to recount, in exquisite detail, the exact sequence of events he witnessed and could not bear to watch.

"There was absolute silence," he recounts, "It was terrible. To see a man brought out and put to death while we watched."

"It was the most unearthly feeling – and horrible feeling – I've ever had."

Others deeply affected by Ryan's execution included his counsel, the late, great Philip Opas QC who for the rest of his life regretted his inability to overturn the conviction and sentence of death and Brian Bourke, who remembers the man with profound sadness even today.

So it is important to remember, especially in the shadow of the anniversary we gather to mark, that what moves us about these executions applies across time, across space and across borders.

Australian progress since Ryan

In 1973, the Death Penalty Abolition Act was passed federally, meaning the death penalty could not be applied in respect of offences under the law of the Commonwealth and Territories. A prime mover of that Act on the floor of the House of Representatives was Barry Jones.

Six years ago, this Act was strengthened to foreclose the possibility of any individual State jurisdiction reintroducing the death penalty.

In 1990, Australia confirmed, at an international level, its opposition to the death penalty by ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.

At the end of 2007, Australia sponsored and voted in favour of a landmark United Nations General Assembly resolution which called for an immediate moratorium on executions as a first step towards the universal abolition of the death penalty.

The Australian Government has made the abolition of the death penalty a core human rights objective as well as a prominent part of its bid for a seat on the United Nations Human Rights Council.

What now?

Given this evolution, the question for us today is: where does this leave us?

Having emphatically shut the door on capital punishment within our own borders, having signed on to international conventions, having put Australia's name to General Assembly Resolutions, having made the abolition of the death penalty a key priority of our bid for the UN Security Council – what remains to be done?

We know that what prevents other countries from abolishing the death penalty is political will. So how do we, as a legal profession and as concerned individuals and organisations, nurture this will throughout the world?

In 2015, the Law Council made a submission to an inquiry of the Joint Standing Committee on Foreign Affairs, Defence and Trade into Australia's advocacy for the abolition of the death penalty.

When I appeared before the Committee - along with Dr Natasha Molt, the Senior Legal Advisor within the Law Council's Policy Division - we explained two key recommendations for further steps Australia could take to advocate for an end to the death penalty:

1. that Australia should develop a strategy for abolition of the death penalty, outlining the methods it will employ to proactively advance the objective of global abolition; and
2. that Australia should strengthen its domestic legal frameworks and arrangements to ensure Australia does not expose anyone to the real risk of execution.

I wish to touch on both of these this morning.

A National Strategy

Firstly, it is the Law Council's view that the Australian Government should develop a whole-of-government strategy that focuses our efforts on retentionist countries in our region. To:

- Lay out precedent and procedure for Australia's opposition to death sentences and executions of foreign nationals;
- Fund projects that seek to advance the cause of abolition in the region, including advocacy efforts to shift public opinion and key decision makers;
- Provide a structure for training and networking of representatives of abolitionist civil society groups within the region; and
- Provide a structure for engaging with the private sector and supportive high-profile or influential individuals in priority countries.

This is by no means an exhaustive list and it is consistent with action undertaken elsewhere.

From 2010 to 2015 the UK had a Strategy for the Abolition of the Death Penalty. There is much that could be learnt from the British experience, the European Union and other governments.

AFP guidelines

So the national strategy was one key recommendation.

The other concerns with the current AFP Guidelines on international cooperation and the sharing of intelligence - the Guideline on International Police-to-Police Assistance in Death Penalty Situations.

This guideline contains no requirement that the AFP seek a guarantee from their counterparts that information it provides will not be used by overseas authorities to seek or impose the death penalty against a perpetrator.

Between December 2009 and December 2014, a vast majority of the 1,847 people whose names were provided by the AFP to foreign police forces were being investigated for drug offences in countries where the death penalty is widely imposed and sometimes applied.

As we understand it, three to 15 requests for assistance in were denied by the AFP because of the death penalty concern.

These figures, suggest that the AFP, when exercising its discretion to disclose information, considers a range of factors - one of which may be the risk of the death penalty.

But it is not clear how the risk of the death penalty is weighted in favour or against the provision of information in death penalty cases.

Nevertheless, the figures appear to indicate that requests for assistance from death-penalty states are approved in the vast majority of cases.

The issue, then, is whether this is appropriate in light of Australia's opposition to the death penalty.

It is the Law Council's view that reform would relieve the AFP of the burden of making such complex decisions in life and death matters and where there may be counter-veiling transnational cooperation objectives.

The Law Council would therefore support appropriate legislative reform of the Australian Federal Police Act 1979 (Cth), in light of the complexities presently faced by the AFP in exercising discretion to disclose information.

Recommendations of the Committee

"The World without the Death Penalty" the Joint Standing Committee's excellent final report, published in May last year, contained a number of recommendations that aligned very strongly with the Law Council's. I acknowledge the work of the committee members including Philip Ruddock.

We will hear from Mr Ruddock later this morning, but concerning the AFP National Guideline, the Committee recommended this be amended to include a stronger focus on preventing exposure of all persons to the risk of the death penalty.

It recommended that this occur through a number of means, specifically:

- articulating as its primary aim preventing the exposure of persons to arrest or charge in retentionist countries for crimes that are likely to attract the death penalty;
- explicitly applying the Guideline to all persons, not just Australian citizens;
- including a requirement that the AFP seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided; and
- including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision.

The Committee also backed a broad Strategy for Abolition of the Death Penalty with goals to include:

- an increase in the number of abolitionist countries;
- an increase in the number of countries with a moratorium on the use of the death penalty;
- a reduction in the number of executions;
- a reduction in the number of crimes that attract the death penalty;
- further restrictions on the use of the death penalty in retentionist countries of the Indo-Pacific region; and
- greater transparency of states' reporting the numbers of prisoners sentenced to death and executions carried out.

The Committee's report is, in the view of the Law Council, a tremendously important piece of work.

It contributes both detail and clarity to those of us who wish to see abolition pursued effectively by Australia in our region.

The Law Council therefore calls on the Government to adopt the recommendations and move to convert them into action as a matter of priority.

The Federal Government has been an outstanding advocate against the death penalty in our region and throughout the world.

By responding to the report and adopting its recommendations, it can continue to take the lead and ensure Australia has a consistent approach with its international engagement.

Council of eminent persons

As well as the recommendations of the Committee, the Law Council is also of the belief that the Australian judiciary and legal profession have a special role to play as 'ambassadors' for abolition. This idea I first heard promoted by Justice Lex Lasry AM and it is an excellent one.

The indication we have from our counterpart bar associations and law societies in other countries and in international lawyers associations such as Lawasia, is that success in any strategy of abolition will require consistent dialogue between those with influence here and abroad.

We must build on established relationships of trust in the region.

One initiative where we believe the profession can be of great assistance is in contributing to the creation of a council of eminent persons, including senior judges, lawyers and those with specialist knowledge in the field.

Those on the Council could act as influencers and advance regional discussions in private and public fora.

We know this is an initiative that already has the strong support of a number of Chief Justices.

And we believe it would require only a modest level of government support to get off the ground.

It would be a natural extension of the Australian legal profession's long-standing view that the death penalty represents such a grave human rights violation, that it transcends considerations of State sovereignty and becomes the legitimate subject of comment and scrutiny by individuals outside the State.

It would be a perfect extension to, and application of, soft diplomacy.

Conclusion

So in conclusion, the abolition of the death penalty remains as potent and relevant in 2017 as it was in 1967.

I recognise the moral clarity and persistence of a previous generation of those with influence in removing the death penalty from the range of possible sentences within Australia.

It is the responsibility of this generation to continue the work so that the most fundamental of human rights is observed across our neighbourhood – and the world.

Thank you.

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