



Law Council
OF AUSTRALIA

The death penalty and criminal justice in Asia

**Speech delivered by Morry Bailes at IBA 2019 Annual Conference,
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Australia's last execution took place in February 1967.

Six years later, our Federal Parliament passed the *Death Penalty Abolition Act 1973*.

Despite this Act, the death penalty remained in force in some parts of Australia. New South Wales was the last Australian state to abolish the death penalty for all crimes in 1985.

However, it may surprise many of you that it was not until April 2010 that the Australian Parliament amended the *Death Penalty Prohibition Act* to finally ensure that the death penalty could not be re-established in Australia.

Our own experience is that abolition is a slow and sometimes piecemeal process.

It is also the Australian experience that leadership is critical to the successful abolition of the death penalty and maintaining abolition in the face of public calls for severe punishments.

We see the importance of leadership in the public response to death sentences passed overseas in relation to crimes involving Australians.

For example, in the case of Andrew Chan and Myuran Sukumaran who were executed by firing squad in Indonesia at 3.35am on 29 April 2015.

Chan and Sukumaran were the ringleaders of the so-called Bali Nine. They and seven others were convicted of attempting to smuggle more than eight kilograms of heroin into Australia in April 2005.

Australia's then Prime Minister, John Howard, said his government would oppose any death sentence handed down. A change in government did not change this position.

But during their time in prison, the pair changed dramatically. Chan studied theology and became a Christian pastor who provided an English-language church service in Bali's Kerobokan prison.

Sukumaran studied fine arts and painted prodigiously, mentored by Australian artist Ben Quilty.

Together, Chan and Sukumaran established a drug rehabilitation program for their fellow prisoners.

Support from the Federal Government was matched by that of the broader Australian community.

Despite persistent lobbying and clearly demonstrated rehabilitation, Chan and Sukumaran were executed.

What was most upsetting for Australians was that these convicted drug smugglers had transformed themselves – completely turned their lives around. They were ready to re-join society.

Killing them did not feel like justice – they felt like a waste.

However, Australia's leadership in opposing to the death penalty is not as solid as it should be.

As a nation, our principles were challenged when reflecting upon the execution of men convicted of the 2002 Bali nightclub bombings, which killed 202 people including 88 Australians.

Imam Samudra, Amrozi Nurhasyim and Huda bin Abdul Haq were executed at 12.15am on 8 November 2008 for their role in the bombing.

Their execution was welcomed by many in Australia.

At the time of the executions, one Australian survivor said:

...we've waited a very long time for this and this is our justice.

On the fifth anniversary of their execution, Australia's shadow Minister for Foreign Affairs Robert McClelland, restated his party's universal opposition to capital punishment.

Conversely, his leader and future Prime Minister, Kevin Rudd, described the timing of McClelland's remarks as "insensitive".

Australia's then-Prime Minister, John Howard said at the time:

I find it impossible myself as an Australian, as Prime Minister, and as an individual, to argue that those executions should not take place when they have murdered my fellow countrymen and women.

Within Australia, there is still some appetite for the death penalty.

A 2014 survey asked: "If a person is convicted of a terrorist act in Australia which kills someone should the penalty be death?"

52.5 per cent of those surveyed agreed the penalty should be death.

Abolition in Australia relies on a single line of legislation: "The punishment of death must not be imposed as the penalty for any offence" (*Death Penalty Prohibition Act*, s6).

During a parliamentary inquiry into *Australia's Advocacy for the Abolition of the Death Penalty* by the Joint Standing Committee on Foreign Affairs, Defence and Trade, Professor Gregory Craven, Vice-Chancellor of the Australian Catholic University, observed:

I have always been concerned at the ease with which discourse in Australia could or can very easily slip back into support for the death penalty. We commonly tell ourselves that in Australia this could never happen again. But there is a natural knee-jerk reaction if cases are bad enough, if they involve child abuse or terrorism, for example, that people will very quickly consider the possibility of capital punishment. My view is that the reason it does not get anywhere is not necessarily because that is the popular view but that there is, if you like, an aristocratic consensus at the policy-level that prevents it.

Australia does not have constitutionally protected rights, such as the right to life.

We do not have a national Charter of Rights.

We rely on leadership to maintain abolition in Australia and to bring about abolition overseas.

This is why, on the 50th anniversary of the last execution carried out in Australia, the Law Council convened a national symposium in Melbourne to discuss how government, the legal profession and others can effectively contribute to the global abolition of the death penalty.

The symposium involved ministers, shadow ministers, members of parliament, government officials from a range of countries, lawyers and community organisations.

The symposium commended a recommendation from the inquiry into *Australia's Advocacy for the Abolition of the Death Penalty* that:

Australia should develop, fund and implement a whole-of-government strategy for the abolition of the death penalty with a particular focus on countries in the Asia-Pacific region and the United States of America.

The government has since launched *Australia's Strategy for Abolition of the Death Penalty*.

Aside from the notable omission of any reference to the United States, and its silence on the issue of human rights, it is a useful statement of policy.

The Law Council's opposition to the imposition or execution of the death penalty is absolute.

Our opposition to the death penalty rests primarily on our belief that it represents a breach of the most fundamental human right; the right to life.

The universality of the right to life is what provides the basis for our support for global abolition.

The death penalty is a matter that transcends considerations of State sovereignty.

That is, the Law Council does not accept that whether and in what circumstances the death penalty may be imposed is a matter to be resolved exclusively by states themselves, without reference to international laws and standards.

The Law Council believes the imposition and execution of the death penalty by a state is a legitimate subject of comment and scrutiny by individuals outside the state or indeed by other states.

The death penalty is a peculiar problem for our region.

Although there has been a trend towards abolition globally, our region, the Asia-Pacific region, is arguably host to some of the world's top executioners.

We should all be dismayed when countries in our region move back towards the death penalty.

According to Amnesty International, in 2018:

- Sri Lanka took significant steps to restore its capacity to execute prisoners, including by hiring and training two executioners and purchasing a new noose. If plans to execute four prisoners convicted of drug related crimes are carried out, this would end a 42-year moratorium.
- Japan carried out 15 executions – almost four times more than were executed in 2017 (4).

- Thailand resumed executions, killing one man by lethal injection on 18 June.
- Taiwan carried out its first execution since 2016.
- Singapore's use of the death penalty, generally for drug-related offences, has continued to trend upwards.
- Pakistan has also continued to increase its annual number of executions, rising to 14 in 2018 with at least 4,864 persons sentenced to death.
- Nauru, which abolished the death penalty in 2016, did not sign the 2018 UN Moratorium on the Death Penalty.
- Vietnam carried out 85 executions, placing it among the world's top five executioners.
- China continues to classify records of its executions as a state secret. There is therefore no data on the number of executions carried out in China, but it is likely thousands were executed.

Finally, the abuse of human rights, including through state sanctioned killings, in the Philippines and North Korea should not be excluded from our consideration.

Continued use of the death penalty is a global problem.

Together we must look for moments of progress and build on them.

And there is hope.

- Bangladesh – which has more than 1,500 people under sentence of death, including at least 229 sentences passed in 2018 – did not execute anyone in 2018. This is an important achievement. The death sentence of a man convicted for murder in South Korea was commuted to life imprisonment in September 2018. Indonesia and Papua New Guinea continue to sentence people to death but have also paused executions.

Perhaps these are the beginnings of moratoria leading to abolition in these countries.

Finally, we are filled with hope when our colleagues in the region, notably bar association colleagues in Japan and Malaysia, take a firm stance against the death penalty and call on their governments to join them in leading this change.

Those of us who share their views must do everything we can to support their cause.

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