



Law Council
OF AUSTRALIA

Poverty and the Death Penalty – reflections on 50 years of abolition in Australia

Speech delivered by Fiona McLeod SC, President, Law Council of Australia, at the World Day against the Death Penalty Dinner, Brisbane.

20 October 2017

Introduction

Thank you, Steven.

Your Honours, Senator Moore, Minister for International Development and the Pacific, the Honorable Terri Butler, Shadow Minister for preventing Family Violence, for Universities and for Equality, the Honorable Matt Foley and Geoffrey Robertson former appeal judge of the Special Court for Sierra Leone and all-round legend.

And Steven, also one of the legal profession's great legends.

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

I recognise the interest that many of our first peoples have in this topic and in our journey towards abolition here in Australia – and I recognise the suffering of their ancestors as a result of the brutal and systemic annihilation programs sanctioned by the law and those in authority at the time.

Thank you to our hosts this evening, Australians Against Capital Punishment and Amnesty International.

And I also acknowledge the invaluable support of Australian Lawyers for Human Rights.

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

Last week we marked the World Day Against the Death Penalty, a global reminder of the sheer inhumanity of the death penalty.

As Australians, 2017 has a particular resonance – as it marks 50 years since the last person was killed by the state in this country.

It is also 40 years since the landmark Sackville report into poverty, which pointed with such clarity to the connection between poverty and injustice and to truths we have not fully recognised or responded to in all that time.

It is the fact that 14 per cent of Australians are living below the poverty line, yet only 8 per cent are able to access legal aid. This translates into 10,000 cases each year where a person who needs assistance in court is unrepresented. It means 160,000 people seeking help are turned away by community legal centres each year.

This year the Law Council is undertaking the Justice Project, a major research project examining the experiences of those who fall through the gaps.

In recent months I visited jails and learned that women prisoners on short sentences have their babies removed within 24 hours of birth by child protection, I have been to nursing homes, to bush courts and hospitals, to remote communities where they are losing their children and their young men and women to detention centres and jails.

It is patently clear to me that poverty and injustice are inextricably linked.

Ronald Ryan

Let me tell you something about the last man hanged in Australia, Ronald Ryan.

On 3 February 2017, I stood in silence with a small group, early in the morning, to mark the anniversary.

We were gathered outside the bluestone walls of Pentridge Prison in Coburg, Victoria.

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.

He had been born 42 years earlier in Carlton, the only son of John Ryan, an invalid and former miner, and Eveline Thompson, a domestic servant.

His parents were sick, alcoholic, and poor.

He was abused by his violent father and neglected by his mother.

After the theft of a watch from a neighbour, an 11-year-old Ryan was made a ward of the state and sent to Rupertswood, Sunbury, a school for 'wayward and neglected' boys.

His was a story all too familiar to us. The pain and struggle of families, the crimes of poverty that begin a cycle of reoffending. The glimpses of hope that are overwhelmed by circumstance.

At Rupertswood Ryan captained the football and cricket teams, joined the choir, and was said to be 'a natural leader'.

But after several failed escape attempts, he absconded in 1939 and went to Balranald, in New South Wales, where he settled with his mother and three sisters, worked as a labourer, and largely kept his head down.

At 23, he returned to Melbourne where, by 1950, he was employed as a storeman. That year at St Stephen's Anglican Church, in Richmond, he married Dorothy Janet George, educated at a private school, rebelling against her wealthy parents.

In 1953, Ryan was acquitted on a charge of arson.

He got over his head with gambling debts, and uttered a number of forged cheques.

By 1959, he was virtually a professional criminal, leading a gang that broke into shops and factories. He was arrested in April 1960, but he and three accomplices escaped from the police. They were recaptured several days later.

He pleaded guilty in the Melbourne Court of General Sessions to eight charges of breaking and stealing, and one of escaping from legal custody.

He was sentenced to eight and a half years in jail.

His rehabilitation was judged a success and he was released on parole in August 1963.

But he soon returned to crime.

A series of factory-breakings and safe-blowings in Melbourne, led to an eight year sentence in 1964.

Ryan and fellow prisoner, Peter Walker, escaped from Pentridge jail on 19 December 1965.

During the break-out, he seized a rifle and shot dead a prison officer, George Hodson. The circumstances of the shooting are still the subject of debate today.

The subsequent manhunt, which lasted 17 days, dominated the media.

The community was on high-alert, especially after the pair robbed a bank and Walker killed an associate at Albert Park on Christmas Day.

They were eventually captured in Sydney on the fifth of January 1966.

Brought before the Supreme Court of Victoria, they pleaded not guilty to a charge of murdering the prison officer.

On 30 March 1966, the jury convicted Walker of manslaughter; Ryan was found guilty of murder and sentenced to death.

Appeals to the Full Court and the High Court of Australia were rejected.

On 12 December 1966, Sir Henry Bolte's Victorian Liberal Government declined to commute Ryan's sentence – an unusual move for the time.

The decision sparked large-scale opposition, including some of the largest mass protests the country had seen, but the Premier was resolute.

On the day of his death, Ryan refused the offer of sedatives.

His last letter was to his daughters. In it he said "*With regard to my guilt I say only that I am innocent of intent and have a clear conscience in the matter.*"

He had a nip of whisky, and walked calmly onto the gallows trapdoor.

His final words were to the hangman, "*God bless you, please make it quick.*"

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.

This is a truth that must be acknowledged, that an execution touches all involved. It is cruel and traumatic for many.

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 many hundreds of people are executed every year.

Impact

The tragic images and interviews we have with Andrew Chan and Myuran Sukumaran in particular remain raw.

They are 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.

We know that criminal trials and appeals are imperfect. Yet execution permits no correction of errors in the judicial process. And it punishes all those connected with it.

50 years ago, when the last person hanged in Australia was put to death, there were 11 official witnesses.

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 mark this year, 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 and a key pillar 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, Senior Legal Advisor – 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 evening.

A National Strategy

First, 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.

For my part, I have raised the issue of Abolition with my counterpart Bar Associations in Asia consistently seeking to support them as they work to move from execution to moratorium, and moratorium to abolition. Many others including Amnesty and Reprieve are undertaking this good work.

AFP guidelines

The national strategy was one key recommendation.

The other concerns the current AFP Guidelines known as 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.

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.

It is unfair to burden the AFP with this operational discretion. It is a discretion that officers will fulfill as they are obliged, but it is a duty that leaves a scar.

Reform of the Australian Federal Police Act 1979 (Cth) is also required, in light of the challenges faced by the AFP in exercising their 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 excellent recommendations.

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.

The Committee also backed a broad Strategy for Abolition of the Death Penalty.

The Committee's report is 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 government should adopt the recommendations of the Report as a matter of priority.

Council of eminent persons

The third initiative is for the Australian judiciary and legal profession to play a special role 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 is that success in any strategy of abolition will require consistent dialogue between those with influence here and abroad, especially lawyers, judges and Attorney-Generals.

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

Ambassadors 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.

The Poor

I hope that these diplomatic efforts will get off the ground.

And I hope that when they do dialogue will include focus on a point I believe is too often overlooked when we talk about the death penalty.

It is a point that is underscored by the theme of this year's World Day Against the Death Penalty: the link between execution and poverty.

Ronald Ryan was poor. He came from a disadvantaged background.

And this is the characteristic that links him most tightly with all of those around the globe who have been executed since.

Death row prisoners in Pakistan, the United States, China, Malaysia, Malawi, and Nigeria will have little in common – except that they have nearly all faced lives of grinding poverty.

The single most common demographic amongst those on death row is poverty.

It does not excuse their crimes but it provides a familiar context for the offending.

The reasons for this are manifold.

Systemic bias and institutionalised prejudice play roles.

And key is the failure to provide adequate counsel to capital defendants and death row prisoners.

This is perhaps most striking and shameful in the American context, where national resources are ample — but poorly designated.

In the US, whether a defendant will be sentenced to death typically depends more on the quality of his legal team than any other factor.

There are lawyers who have provided outstanding representation to capital defendants, yet few defendants facing capital charges can afford to hire an attorney.

So instead they are appointed attorneys who are frequently overworked, underpaid, or inexperienced in trying death penalty cases.

In the US, and around the globe, it is not uncommon that legal grounds unavailable to the vulnerable are invoked in favour of the influential.

A recent example in India provides a clear example.

Four members of a political party were sentenced to death for burning a bus during a protest and killing three women students.

If they had been poor and without influence, they would surely be on death row, or dead.

Yet the court, while commuting their sentence, invoked the 'doctrine of diminished responsibility' and reasoned that those gripped by mob frenzy were not fully cognisant of the situation around them.

Of course, invoking any ground to commute a death sentence to life is welcome.

But such mercy often comes at a very late stage.

And it is therefore only available to those with the means to pursue legal remedies until the very end.

We can see then that the death penalty is not only unjust, it is also prejudiced.

The world is increasingly waking up to the unsustainability of inequality. Can there be a more powerful example of its impact than the death penalty?

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 who worked tirelessly to remove 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.

When we remember that those who offend against us are themselves human, and treat them with dignity and mercy, we humanise the offenders and we accept our own part in failing them.

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