

Fighting the Death Penalty from Australia:

notes for a talk at a Prisoners Legal Service

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Seminar at the Office of Allens & Linklaters, level 26, 480 Queen Street, Brisbane on Friday, 17 June 2022

Introduction: what is this About?

1. The purpose of my talk, today, is to answer a frequently asked question. The question runs: “We don’t have the death penalty in Australia. Why is the death penalty relevant to me?”
2. One answer to the question is that Australians travel overseas. Australians do silly things including when they are overseas. One day, someone you know may be faced with the death penalty. As a lawyer, you may face a request from a friend of a friend for a basic level of legal assistance in respect of the capital charge which has been brought against them. You never know when the death penalty is going to intrude into your life.
3. Another answer to the question has a touch of John Donne about it. No man is an island. Don’t send to ask for whom the bell tolls. It tolls for thee. While the death penalty is being exercised against anyone in the world, it is an affront to us as human beings. Especially, it is an affront to us as human rights lawyers. Of course, it is relevant to each and everyone of us.
4. The long answer is just a recounting of my story. And, in recounting my story, I hope to suggest a few things that I found interesting: things that you may also find interesting. And I will mention things that we can do in Australia to fight the death penalty both in individual cases and at the level moratoria and abolition.
5. And, maybe, one or two of you in this room may find some of this interesting enough to get involved in the fight against the death penalty at some time in some way.

How I got involved

6. As I have foreshadowed, a lot of what I say on this subject will be influenced by my particular experience. I feel, therefore, as part of this introduction, I should set out some of that experience.
7. I came from an Irish Roman Catholic background with an emphasis on social justice so I opposed the death penalty, unreservedly, for its cruelty, as long as I can remember. My strong views, in that regard, have never faltered.
8. In more recent times, specific events have guided me into a more active engagement with death penalty issues.

9. Towards the end of the first decade of this century, a barrister and friend of mine, Julian Wagner, approached me and suggested that I agree to be the patron of [Australians Against Capital Punishment](#) (“AACP”). Protesting that I was much too young to be patron of anything, I eventually agreed.
10. AACP was and is a loosely structured organisation created by friends of Lee and Christine Rush, the parents of Scott Rush, a member of the Bali Nine who was then on death row in Indonesia. I was impressed, then, and remain impressed that Lee and Christine have always their advocacy not just at saving their son but at the injustice that capital punishment represents for all, especially, when it is used for drug offences.
11. AACP engaged in this advocacy against the death penalty as well as raising money to assist Lee and Chris in a small way with the costs of travelling back and forth to Indonesia to visit their son on death row.
12. Scott Rush had been arrested on 17 April 2005. At his trial, Scott Rush was sentenced, on 13 February 2006, to life imprisonment. However, an appeal against sentence was lodged and, as a result of that appeal, on 6 September 2006, Scott’s sentence on was increased to a sentence of death. That was the situation affecting the Rush family when I first became involved with AACP.
13. It was a great relief, of course, when, on 10 May 2011, an appeal to the Supreme Court of Indonesia resulted in the re-imposition of the sentence of life imprisonment.
14. In 2014, my friend, Julian Wagner, who had got me into all of this, died an untimely death. Julian had been an enthusiastic opponent of capital punishment. At his memorial service, I had the idea that an appropriate memorial to Julian would be an organisation that continued his work.
15. The idea lay dormant for some time but, in 2016, with great help from a number of Julian’s close friends including former District Court judges Marshall Irwin and Sarah Bradley AM and Richard Galloway and Karen Garner, the registered charity, the Julian Wagner Memorial Fund (“JWMF”), became a reality. For my sins, Marshall and the others persuaded me to become a patron of a second anti-death penalty organisation.
16. Between Julian’s death and the commencement of JWMF, many Australians were galvanised into opposing the death penalty and then traumatised, on 29 April 2015, by the execution of Andrew Chan and Myuran Sukumaran by firing squad on Nusakambangan Island in Indonesia.
17. Over the years, AACP and JWMF have carried on a tradition started by AACP of having an annual dinner and other events both to raise money and to raise consciousness about the issues associated with the death penalty. One of our guest speakers was Julian McMahon AC SC who, with Lex Lasry AM QC, had represented Van Tuong Nguyen who was executed in Singapore in 2005 and had represented Andrew Chan and Myuran Sukumaran (originally, with Lasry before he was appointed a judge of the Victorian Supreme Court).

18. The contact made with Julian McMahon led to various other interactions with the organisation of which Julian had become chair, namely, [Capital Punishment Justice Project](#) (“CPJP”). In October 2019, to my surprise, I was invited to join the board of CPJP. Then, in December 2020, even more to my surprise, Julian chose to step down as chair and I became Chair of CPJP.
19. As it turns out, most of what I know about opposing executions and the death penalty, itself, comes from involvement in CPJP. So I should tell you about CPJP.

Capital Punishment Justice Project (formerly Reprieve Australia): an introduction

20. In 2001, two relatively new barristers at the Melbourne Bar, Nick Harrington and [Richard Bourke](#) had the idea to start an Australian body that would assist in opposing the death penalty and assist people at risk of suffering the death penalty. The name they chose for the organisation was Reprieve Australia and the organisation was modelled on the UK organisation, [Reprieve](#). Reprieve was founded in 1999 by British lawyer who worked on capital defence cases in the United States, [Clive Stafford Smith](#) and the film-maker, [Paul Hamann](#), who had made the highly influential film, *14 Days in May*, about Stafford Smith’s desperate attempts to save Edward Earl Johnson from dying in the gas chamber in Mississippi.
21. Richard Bourke is an extraordinary person with an extraordinary life story. In 1998, Richard went to Louisiana as a volunteer intern and worked for a few months on death penalty cases in the Louisiana criminal justice system. His experience led him with Harrington to establish Reprieve Australia in 2001. One of the main tasks of the organisation has been and remains the recruitment of and support of volunteers to work as volunteers in much the same way as Richard did back in 1998.
22. In 2002, Richard returned to Louisiana. Albeit, with short holiday visits back to Australia, Richard has lived permanently in New Orleans and has worked on capital cases, trials and appeals, since that time. He is now director of the [Louisiana Capital Assistance Center](#) (“LCAC”).
23. Since 2001, CPJP has, apart from a recent gap because of Covid 19, continuously sent volunteer interns to work at capital assistance centers in the US including LCAC. We calculate that, over that time, over 70,000 hours of volunteer services have been provided. With international travel, again available, CPJP is looking to resume its interns program.
24. Placements are, generally, for about three months. The positions are unpaid and a volunteer has to meet their own expenses including travel and accommodation. Because this requirement can exclude excellent candidates, albeit without means, one of the projects for which JWMP was brought into existence was to raise funds to provide modest bursaries for successful applicants for intern positions to help meet some of those expenses.
25. Capital assistance centers are under-resourced and have to struggle to meet the demand for their services. The interns program is to help centers with resources so that the

lawyers can get on with their more lawyerly work. Interns do not work as lawyers. They do the things that make the lives of busy lawyers a little easier. As an intern, you may be asked to drive several hours to pick up a death row occupant's family to assist them to visit the prison. That might involve a further long drive to the prison, a lengthy wait in the car park and further hours of driving taking the distressed family back to their homes.

26. Another task might involve a visit to a remote courthouse to inspect and copy documents which might turn out to be important in an appeal. Similar tasks await the volunteer intern in the office. Notwithstanding the lack of glamour and the low level of the work required in terms of intellectual input, CPJP interns have made enormous contributions to the work of opposing the death penalty in the United States. This work and these opportunities to contribute will be ongoing while the death penalty, itself, continues.
27. In recent years, CPJP has come to the view that assisting capital defence lawyers in the United States should not be the only focus of an Australian based anti-death penalty NGO. Australia is part of a region where the death penalty forms part of the legal system in many of the countries in that region. Countries which retain the death penalty in Asia include: Bangladesh, China, India, Indonesia, Japan, Malaysia (subject to a moratorium), North Korea, Pakistan, Singapore, Taiwan, Thailand and Vietnam.
28. CPJP does not yet have a volunteer intern program equivalent to its US program where Australian volunteers serve as interns at law offices in Asian countries for a period of time. However, CPJP does do an enormous amount of work opposing the death penalty in Asia. Such work takes a number of forms and requires a significant amount of resources. The work provides opportunities for volunteer input and CPJP also offers a domestic internship program which provides opportunities to contribute to such work.
29. CPJP supports campaigns against the death penalty, generally, in particular countries and in individual cases. CPJP is often contacted, particularly, in the case of Australians threatened with the death penalty to assist local lawyers acting for the person involved. This can involve many different levels of assistance including obtaining information only available in Australia and having it translated into the local language; having court documents in the local language translated into English so that Australian volunteer can understand the issues involved in the case; by researching international law and international precedents as they relate to the death penalty; preparing drafts of affidavits or submissions by way of assistance to local lawyers in applications and proceedings in the local court and liaising with the Australian government to ensure that consular support being provided is both apt and effective.
30. In 2021, drawing on information provided by local lawyers and consular officials and its own research, CPJP prepared its own amicus brief for filing in an appeal then pending in the Thailand Supreme Court. The amicus brief was also signed by Senator Dean Smith and Chris Hayes, co-chairs of the Commonwealth Parliament's non-partisan Committee Opposing the Death Penalty, thereby, obtaining a degree of Australian Parliamentary official imprimatur.

31. The appeal by Australian, Luke Cook, and his two co-defendants was successful, not only in getting Cook and his co-defendants off death row, but in obtaining their acquittal as the appeal court recognised the thoroughly discreditable nature of the evidence on which the court at first instance had relied.
32. There are many ways in which CPJP seeks, at a systemic level, to promote abolition or reduce the extent to which countries apply the death penalty or engage in other forms of state sanctioned killing. CPJP has applied for and received grants from the Department of Foreign Affairs and Trade (“DFAT”) in Australia; human rights agencies of the European Union; and disparate other agencies empowering CPJP to conduct programs in a number of different Asian countries in which the death penalty still operates directed to lessening the likelihood of its use. These include the development of training programs for defence lawyers; prosecutors and judges which place emphasis, for example, on the importance of mental health issues in criminal conduct and their impact on the degree of culpability of an accused person for their criminal actions.
33. CPJP also assists local human rights defenders in their work opposing the death penalty. This can include providing training programs to upskill local activists and it can include campaigns to mobilise international support for local human rights defenders where they are attacked or targeted for their work as human rights defenders and in opposing the death penalty.
34. As well as supporting local lawyers in their work in defending clients threatened by the death penalty, CPJP has also mobilised international opposition to use of the death penalty by local governments. For example, CPJP played a significant role in mobilising opposition to Singapore’s eventually successful attempt to execute [Nagaenthran Dharmalingam](#), a Malaysian who suffered from severe mental disabilities and whose ability to know that the illegal drug activity in which he had been involved was wrong was very much in doubt. CPJP works closely with DFAT officials, including consular staff, passing on information derived from CPJP’s local contacts, thereby, assisting consular officials’ effectiveness in protesting and opposing foreign governments’ use of the death penalty.
35. I will now discuss two specific aspects of CPJP’s programs which may be of particular interest to you.

CPJP’s Interactive Forage Program

36. [Forage](#) is an online platform that provides access to free, open-access virtual work experience programs. Forage was established in Sydney in 2017 in Sydney to provide new and different approaches to education and training.
37. The organisation describes itself as on a mission to redefine the emerging talent experience. It believes that everyone deserves the opportunity to pursue and land their dream job and provides the training and educational opportunities to make that achievable.

38. Forage and CPJP have partnered to create [a virtual experience program](#) that brings to life CPJP's mission and objectives and allows participants to experience a day in the life of a CPJP volunteer while building skills in research, advocacy and policy.
39. The program is interactive and self-paced. It takes approximately 6 hours to complete and is heaps of fun. The program allows a participant to try a range of tasks that might be experienced by a CPJP volunteer and to develop and apply analytical, communication and research skills for that purpose. These tasks might include assisting in case work or providing diplomatic and consular assistance to a person at risk of execution and the program allows you to develop those skills and the ability to apply them.
40. I highly recommend, if you are interested in becoming involved in some way in the work done by CPJP, that you try the CPJP/Forage virtual experience program.

Eleos Justice: a joint venture by CPJP and Monash University

41. Eleos Justice is a joint venture between CPJP and Monash University. It works out of Monash Law's city campus.
42. Eleos may be described as the Asia Pacific region's leading evidence based anti-death penalty research hub.
43. The director of Eleos is Professor Mai Sato, a social scientist by training whose principal academic focus is the death penalty. Mai has a Ph D from King's College, London and has conducted extensive research into the death penalty including publishing a monograph in 2014 into the way Japanese public's apparent unchanging support for the death penalty has much greater ambiguity and capacity for change when looked at more closely.
44. In its short existence, Eleos has published two very important research reports looking more closely at the way in which the death penalty is used, on the ground, to achieve particular political objectives and to oppress particular minorities. In February 2021, Eleos Justice published *State Sanctioned Killing of Sexual Minorities: Looking Beyond the Death Penalty*. One of the salient features that emerged from the report was the extent to which the death penalty, when used against consenting sexual conduct, has impacts far beyond its actual use as a legal penalty such that it encourages and condones killings of members of sexual minorities by private actors, including family members. Anybody who remembers the murder of George Duncan by unknown actors, thought to be police officers, by throwing him into the Torrens River, in 1972, will empathise with the report's findings that legal proscription of conduct has dangerous ripples that extend well beyond the mere enforcement of the law.
45. The second report, released in October, last year, *Report into State Sanctioned Violations of Religious Freedom*, found similar sinister synergies between the existence and use of capital punishment for religious crimes and extra-judicial killing of members of religious minorities by non-state actors including extremist groups.
46. This research informs advocacy against the death penalty both by documenting and highlighting the human rights abuses and crimes against humanity that are taking place

but, also, by providing better understanding of the underlying motivations and broader objectives being pursued when states stoop to use the death penalty against sexual and religious minorities.

47. Another important aspect of Eleos Justice is its teaching role. The Eleos Anti-Death Penalty Clinic commenced in 2018. It was the first phase of the development of Eleos Justice. It operates as a specialised clinical subject allowing both undergraduate and post graduate law students to engage in anti-death penalty research and advocacy while earning credit towards their degree. The students get to assist on casework with Australian lawyers and with anti-death penalty NGOs in Asia. The course is coordinated by Sara Kowal, my colleague as vice-president of CPJP, who doubles as Manager Partnerships and Clinic at Eleos.
48. Among the projects on which students get to work is the production of a video, each year, for World Day Against the Death Penalty on 10 October. The video is, generally, developed to highlight issues arising out of the theme for World Day, each year.
49. Another project involved producing a video in conjunction with Pakistan's advocacy NGO, Justice Project Pakistan called *Trapped Inside: Mental illness and Incarceration*, a video that looks at the implications of the landmark judgment of the Pakistan Supreme Court, *Safia Bano and others v the State*, which applied international jurisprudence preventing the execution of mentally unsound prisoners to the requirement, in Pakistani criminal law that the death warrant must be read to the prisoner before their execution.
50. One objective of the Eleos Clinic, of course, is to create a generational conveyor belt of new anti-death penalty researchers and advocates to fight the challenges that lie before us into the future.
51. For the law students in the room, I am unaware whether there are exchange opportunities between your law school and Monash/Eleos but, if you want a particularly interesting and relevant clinical practice subject, it might be worth exploring.

Australia's Strategy for Abolition of the Death Penalty

52. The actions of the Australian government in seeking to prevent the executions of Myuran Sukumaran and Andrew Chan in 2015 was marked by excellent cooperation between Australia's foreign minister, Julie Bishop and Australia's shadow spokesperson, Tanya Plibersek.
53. The idea of Australia adopting a formal strategy to guide its actions across the whole of government in opposing the death penalty and seeking abolition was born out of that experience.
54. The strategy was adopted in June 2018 and launched in October 2018.
55. The strategy notes that the death penalty had been abolished in all Australian jurisdictions by 1985 and that the Commonwealth Parliament had passed legislation in 2010, using the

external affairs power, to prohibit any state or territory from reintroducing capital punishment.

56. The strategy places opposition to the death penalty into the context of human rights and includes in the reasons for opposition the penalties irrevocability and the potential for error; its denial of the possibility of rehabilitation; the lack of evidence supporting deterrent value; and its unfairness arising from its disproportionate use against the poor, people with intellectual and mental disabilities and minority groups.
57. The strategy notes that other countries' movement to abolition are likely to be gradual and that interim goals must be incremental involving reducing, in some countries the number of offences that attract capital punishment; removing mandatory sentences of death; reducing the use of the death penalty; and requiring fair trial processes and transparency about the use of the penalty.
58. The strategy places obligations on consular staff in overseas posts to report on use of the death penalty and to collect information by liaising with local human rights institutions and anti-death penalty activists.
59. The strategy also places obligations on ministers and officials travelling overseas to raise the death penalty as a priority human rights issue in official meetings and communications.
60. The strategy also supports the funding of national human rights institutions and civil society organisations that further global abolition including awareness raising of politicians and policy makers and projects aimed at public opinion.
61. As you may be able to perceive, a lot of what CPJP does, including its work with overseas civil society organisations is in accord with the objects of the strategy.
62. It is because of the strategy that CPJP feels confident in providing information and raising issues with DFAT and consular staff suggesting that particular action be taken and representations be made.
63. It seems to me that this cooperation between CPJP as a private organisation and the government has been effective in improving the situation of individuals and progressing the cause of abolition, generally.

The Parliamentary Committee

64. The last subject I wanted to touch upon is the Commonwealth Parliament's bipartisan Committee against the Death Penalty.
65. Some of you may remember that Phillip Ruddock, when he was a member of Parliament but not a minister, was a high profile co-chair of the committee. In the most recent Parliament, the co-chairs were Chris Hayes, the Labor member for Fowler and Senator Dean Smith, a Liberal senator from Western Australia.

66. I have already told you that Senator Smith and Mr Hayes co-signed the successful amicus curiae brief addressed to the Supreme Court of Thailand.
67. The committee, as a whole, has been generally supportive of CPJP's work. As with DFAT and the consular staff, CPJP keeps the Committee abreast of developments of which we become aware and, if we suggest that a letter to a particular official might be helpful, they are usually happy to oblige. They were particularly supportive of our work on Luke Cook's case which support came both before and after the amicus brief.
68. A bipartisan group of members of parliament devoted to a cause are a great resource and CPJP are very grateful for what the committee do.

Stephen Keim SC
Chambers
17 June 2022