

DEATH PENALTY TO EXECUTE ONE TERRORIST IS TO REWARD TERRORISM*

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INTRODUCTION

We have heard much about the responses of governments to terrorism and what has been done since “9/11” to investigate, and perhaps deter, social atrocities. Some might argue that the death penalty must be re-introduced as a deterrent or an appropriate form of “just desserts”. This is despite the fact that many countries have abolished the death penalty in recent years. Politicians may also wish to capitalise on the public’s apparent fear of terrorism by re-introducing capital punishment.

Australia completely abolished the death penalty in 1985 with the last hanging in 1967. However, since “9/11” some Australian politicians have apparently entertained the idea of the death penalty. In 2003, Prime Minister John Howard said on US TV that he would welcome the death penalty for Osama Bin Laden¹ although later the same year he said in Australia that he personally didn’t support the death penalty though wouldn’t request the Indonesian Government to commute the Bali Bomber’s death sentence where 88 of the 202 victims were Australian.²

Many countries in South East and greater Asia have retained the death penalty for a variety of crimes. Others have retained a “*de facto*” form of capital punishment, that is to say, life termination laws still exist although they are not put into effect. Japan, for example, has had people on death row for many years.³

Today, I propose to walk you all through the various rationales so as to explain why the death penalty will not deter or curb serious crimes including terrorism offences. I will mainly focus upon the position in Australia and greater Asia as many of you who are from that part of the world. I will refer to experiences in the United States and other countries where necessary.

* The author would like to acknowledge Julian Wagner LLB LLM (Qld), barrister, in researching and assisting with this paper.

¹ Walton, M, *Australia Changes its Position on the Death Penalty*, March (2003), NSW Council of Civil Liberties.

² *Sydney Morning Herald*, 9-10 August 2003.

³ More than 10 members of the Aum Shinrikyo sect have been sentenced to the death penalty since the 1995 sarin nerve gas attacks, *Aum Chemist Sentenced to Hang*, The Japan Times, 31 January 2004, www.japantimes.co.jp. For summaries of proceedings against the cult leader, Shoko Asahara and others, see *Aum Sinrikyo*, www.cultsoncampus.com

THE AUSTRALIAN POSITION - OVERVIEW

In outlining the Australian position, it is perhaps best to commence with the case of Ronald Joseph Ryan which raises applicable considerations generally.

"God bless you, please make it quick" were the last words of the last person executed in Australia. Ryan was convicted by the Supreme Court of Victoria in March 1966 for the murder of a prison guard during a prison break out. Ryan was hanged in February 1967, despite appeal proceedings, less than a year after conviction.

In 1986, a former prison guard, Douglas Pascoe, confessed on national television to firing at the now deceased Ronald Ryan during the escape apparently believing he may have accidentally killed the prison guard. He did not say anything at the time, as he feared he would be in trouble. Mr Pascoe, 23 years of age at the time of the shooting, stated:

*"What I do know is that had I not been such a devout coward, had I mentioned the fact I had fired a shot from the tower in the direction of the escape, there is no way they would have hanged Ryan."*⁴

Pascoe also thought that Ryan's death sentence would be commuted to life imprisonment as there had not been an execution in Victoria since 1951 and 35 death row inmates had their sentences commuted to life imprisonment. Some of the jurors came forth and stated they would not have convicted Ryan of murder had they known that he would in fact be executed.

You may ask, why wasn't Ryan's death sentence commuted to life imprisonment?⁵ The preponderant view is that the Victorian Government at the time was facing another State election and the then Premier, Henry Bolte, wanted to win votes by taking the "tough on crime" stance. The Premier is reported as having said, *"A hanging is 10% of the vote."*⁶ The Premier's successor, Rupert Hamer, abolished the death penalty in Victoria in 1975.⁷

⁴ Australian Coalition Against the Death Penalty, 10 September 2003, www.acadp.com

⁵ Julian Burnside QC has asserted that Ryan was guilty though accepts that he should not have been executed., Ryan's Defence Counsel, Dr Philip Opas QC as well as the Victorian Criminal Bar Association have strongly disagreed with the suggestion of guilt. See Dr Philip Opas QC, *Julian Burnside – The Moral Exhibitionist*, 15 March 2002, www.angelfire.com

⁶ Jeff Kennett, a former Liberal Premier of Victoria is said to have been told by Henry Bolte in the 1980s that: *"If you want to win an election, have a hanging."* *Sir Henry Bolte, the Hanging State Premier*, www.angelfire.com

⁷ See *Tait v The Queen* (1962) 108 CLR 620 concerning the attempt by the Bolte Government to hang an inmate prior to the finalisation of appeal proceedings to the High Court and the Privy Council. Since 1986, the Judicial Committee of the Privy Council no longer hears appeals from Australia. It still hears appeals from countries such as the

Capital punishment has been abolished in Australia in all States and Territories for many years. The Whitlam Federal Government abolished capital punishment in 1973 for Federal offences.⁸ Queensland was in fact the first State (in 1922) to abolish capital punishment for all serious offences.⁹ New South Wales abolished the death penalty for murder in 1955¹⁰ though, strangely, it wasn't until 1985 that the death penalty was repealed in NSW for crimes of piracy, treason, and arson of naval dockyards.¹¹ Perhaps NSW forgot that the death penalty still existed for such offences? Western Australia was the last State to abolish the death penalty in 1985 with the lasting hanging in that State being in 1964.¹²

In 1991, Australia became a signatory to the Second Optional Protocol to the *International Covenant on Civil and Political Rights* concerning the abolition of the death penalty. In Europe, Protocol 13 to the *European Convention on Human Rights* bans the death penalty in all circumstances and came into force on 1 July 2003, that is to say, after the "9/11" attack.

People were executed in Australia in the 19th Century for many offences that most would consider petty nowadays. After all, Australia had inherited English law which, in the early 19th Century, provided the death penalty for some 250 offences ranging from robbing a rabbit warren to cutting down a tree, as well as theft and, of course, murder.¹³ Many convicts who otherwise faced the death penalty in England were transported to Australia.¹⁴ However, as in England, it eventually became evident that capital punishment did not deter offences,¹⁵ and juries became disinclined to convict.¹⁶

It is estimated that the some 1, 648 people have been executed in the history of

Bahamas. For example, the capital punishment case of *Higgs & Mitchell v Minister of Social Security and Others (Bahamas)* [2002] 2 AC 228.

⁸ *Death Penalty Abolition Act 1973 (Cth)*. The Bill was actually introduced by Senator Lionel Murphy through the Senate on 21 March 1968, three months after the execution of Ronald Ryan. The Bill kept on being adjourned by the then Liberal Government in the House of Representatives though was finally passed when the Whitlam Labor Government came to power. The Senate speech at p 979 contains statistics for persons convicted for murder in Australia between 1956 and 1965, when six executions were carried out.

⁹ *Criminal Code Amendment Bill 1922 (Qld)*. The heavily debated Second Reading speech proceedings appear at the Legislative Assembly Debates, Vol CXXXIX, (1922), p 393.

¹⁰ *Crimes (Amendment) Act 1955 (NSW)*

¹¹ *Miscellaneous Acts (Death Penalty) Act 1985*.

¹² *Criminal Code Amendment Act WA*.

¹³ As observed during the Second Reading by Attorney General Mullan when Qld abolished capital punishment in 1922 op cit at pp 393-394.

¹⁴ As to the imposition of the death penalty and other treatment of convicts in Australia, see Hughes, R, *The Fatal Shore*, 1987, Panther.

¹⁵ Ibid at 393-394 at Fn 13

¹⁶ It appears that juries were less inclined to convict white defendants in Australia in the 19th Century as compared to Aborigines. As to crime generally in 19th Century Queensland, see *The Book of Trials, 1835-1842*, (John Oxley Library, Queensland) and Wagner, J, *Queensland's First Magistrate*, Queensland Bar News, (No11), 2002, p 15.

Australia. Despite the vast increase in Australia's population over the past two centuries, it is perhaps of interest to note that there were more hangings in the 19th century than in the 20th century. For example 390 people were executed between 1830 and 1839 compared with 12 people being executed between 1930 and 1939. A study by the Australian Institute of Criminology revealed that the murder rate in Australia remained stable in the 20th century despite the removal of the death penalty.¹⁷

In both Australia and England, where the death penalty has been abolished, the murder rate is 0.8 per 100,000.00 people.¹⁸ By contrast, the murder rate in the United States where the majority of States have the death penalty, is around 8.5 per 100,000.00 people. The murder rate is in fact higher in US States that have the death penalty.¹⁹

ASIA - OVERVIEW

As stated, I will mainly focus on the death penalty position in our region of the world. From a worldwide perspective, however, I simply note in passing that as at April 2003, 112 countries have abolished the death penalty either in law or practice with 83 still using the death penalty. China, Iran, Saudi Arabia, and the USA carry out the vast majority of executions and account for 85% of reported executions.²⁰

Some countries carry out executions in secret or there is simply no record keeping. For example, executions in Iraq have never been officially reported and the Indian Government, the world's largest democracy, does not publish statistical information. Amnesty International claims that 1,625 prisoners were executed in 37 countries in 1998 with 1,067 in China, 100 in the Congo, 68 in the US and 66 in Iran.²¹ Three years later, Amnesty International reported that in 2001, 2,500 executions were conducted in China alone,²² and in March 2003, it was reported that China had developed a "mobile execution vehicle" for the easier delivery of lethal injections.²³

The position in South East Asia and greater Asia is in stark contrast to the Australian position. In 1997, eleven member States of the United Nations voted

¹⁷ Potas, I & Walker, J, *Capital Punishment*, AIC February 1987. Also see ACADP, 10 September, 2003.

¹⁸ England abolished the death penalty in 1965. In 1908, England abolished the death penalty for juvenile offenders.

¹⁹ ACADP, 10 September 2003, op cit fn 14.

²⁰ Ibid.

²¹ www.education.theage.com.au

²² *China Daily*, 27 January 2005. The *Age* (19 January 2004) refers to a figure of 2,468 deaths in 2001 though with a slight reduction in 2002 with 1,060 deaths.

²³ *The Australian*, 13 March 2003.

against a UN Human Rights Commission resolution calling on all States to consider suspending executions with a view to abolishing the death penalty. Eight of the eleven Countries were Asian with the other three being Algeria, Egypt and the United States. The Asian countries included China, Indonesia, Japan, Malaysia, and South Korea.²⁴ In recent years, the Philippines and Sri Lanka have re-introduced the death penalty.²⁵ Singapore and Vietnam have increased the number of death sentences per year and Indonesia and Thailand still carry out executions. Indeed, Amnesty International has claimed that in 2003, the Thai Government condoned, or at worst authorised, an extra-judicial shoot-to-kill anti-drug purge of anyone believed to be involved in the drug trade. It is claimed that 300 suspects were killed in two weeks without trial.²⁶

In 1993, Japan lifted a four year moratorium on capital punishment. On 21 February 2005, *Asian News* reported that Japanese support for the death penalty was at a record high reflecting widespread fear following the nerve gas terrorism killings by the Aum Shinrikyo cult.²⁷ Ordinarily, violent crime in Japan is relatively rare.²⁸

Bangladesh, which also voted against the 1997 UN resolution, has recently used special courts known as "Speedy Trial Tribunals" to sentence people to death. According to Amnesty International, the Tribunals sentenced 130 people to death in 2003, although most are still awaiting actual execution.²⁹

The Asian position is not completely grim. Cambodia, where the Pol Pot regime had murdered many citizens in the late 1970s, abolished the death penalty in 1989. On 20 March 2004, Bhutan abolished the death penalty despite having voted against the 1997 UN resolution.³⁰ When removed, the Bhutan death penalty was only applicable to treason, that is to say, a political offence. Whilst retaining the death penalty, Brunei appears not to have executed prisoners since 1957. Several other countries in the Pacific have either abolished or not used the death penalty. PNG retains capital punishment for sedition though has not executed anyone in recent times.³¹ Fiji has the death penalty, though in February 2002, President Josefa Iloilo, commuted the death sentence of a coup leader, George Speight.³² Samoa's last execution occurred in 1951, though citizens recently demanded the use of death penalty in 2003 when a five year old girl was found hanging from a tree after being raped by a 19 year old male

²⁴ Amnesty International, 4 April, 1997, www.hartford-hwp.com – News Service

²⁵ Asia Pacific Forum of National Human Rights Institution, 8th Annual Meeting, February 2004, Kathmandu, www.asiapacificforum.net

²⁶ Karpal Singh, *The Death Penalty: Unfairness, Inequality and a Crime in Itself*, 2003.

²⁷ Trial proceedings in the Tokyo District Court and elsewhere have continued for almost a decade. See fn 3.

²⁸ www.asiannews.it

²⁹ www.asiapacific.amnesty.org

³⁰ www.asiapacific.amnesty.org

³¹ See *Criminal Code (PNG)*.

³² *Speight's Death Sentence Commuted to Life*, Canberra Times, 19 February 2002.

offender.³³ The offender was not sent to the gallows.³⁴

Whilst the offender in the Samoan case was technically an adult, there are countries which execute child offenders, despite the existence of Article 37(a) of the United Nations Convention on the Rights of the Child of 1995 which prohibits the death penalty for persons under 18 years of age at the time of the offence. These countries include the United States of America where at least 366 juvenile offenders have been executed since 1642.³⁵ Some 226 juvenile death sentences have been handed down since 1973 although only 22 (15%) have resulted in actual execution. Almost 2/3rds of the more recent executions occurred in Texas.³⁶ Needless to say, the American Bar Association opposes the death penalty, especially for children. It posts the pictures on its website of many on death row as well as those who are no longer with us.³⁷

There is, however, a strong view within the American legal system that juvenile executions violate the Eighth Amendment of the Constitution concerning cruel and unusual punishment.³⁸ The United States Supreme Court will soon hand down a decision in *Roper v Simmons* (No. 03-0633) (Capital Case) which is expected to uphold a ruling by the Missouri Supreme Court that juvenile executions violate the Eighth Amendment.³⁹

Islamic countries are also known to execute children.⁴⁰ For example, a 13 year old was executed in Yemen in July 1993⁴¹, and a 16 year old girl was hanged in Iran in August 2004 for an “act incompatible with chastity”, namely pre-marital sex.⁴² Islamic law provides for the death penalty for murder and drug trafficking as well as other so called offences such as apostasy (changing ones religion), adultery, preaching Christianity or Judaism and homosexuality.⁴³ At the same

³³ *R v Ieu Passi Leleimalefaga*, Supreme Court of Samoa, April 2003.

³⁴ Generally, see the Samoa Observer, www.samoaoobserver.com concerning the prosecution and public sentiment. .

³⁵ Streib, V, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, 1 July 2003.

³⁶ Ibid at p 2.

³⁷ See Juvenile Death Penalty Cases, www.abanet.org

³⁸ American Civil Liberties Union Report, *The Anniversary of Furman v George*, June 2003. In *Stanford v Kentucky* 492 US 361 (1989), the US Supreme Court set the minimum age for the death penalty at 16 years of age. Since then, eight States have established the minimum age as 18 years of age, raising the total number of States banning juvenile executions to 31 States: Mulvaney, P, *Waiting for Roper v Simmons*, 23 January 2005, The Nation, www.thenation.com

³⁹ Argument was heard before the US Supreme Court in October 2004. For an update, see The Nation at www.thenation.com; Sentencing Law & Policy at www.sentencing.typepad.com & www.deathpenaltyinfo.org

⁴⁰ ACADP op cit.

⁴¹ *Capital Punishment – the Ultimate Punishment*, The Age, 27 June 2001, www.education.theage.com.au

⁴² ACACP op cit.

⁴³ ACADP ibid. Homosexuals have been executed between 1990 and 2000, in Afghanistan, Iran, and Sadi Arabia, The International Lesbian & Gay Association, *World Legal Survey*, 31 July 2000, www.ilga.nfo

time, sexual intercourse with nine-year-old girls under the guise of marriage and pedophilia in general is accepted as lawful.⁴⁴ Since 2000, juvenile offenders are known to have been executed in China, and the Democratic Republic of Congo.⁴⁵

There are, however, some positive changes. In July 2000, Pakistan outlawed the execution of persons less than 18 years of age so as to bring its laws in line with the UN Convention on the Rights of the Child.⁴⁶ At the time, there were some 50 children on death row with more than 4000 children languishing in jails.⁴⁷

Malaysia, after much protest in the late 1970s, commuted a death sentence for a 14 year old boy who was convicted of being in possession of a pistol and 20 rounds of ammunition.⁴⁸

In America, it is said that over 90% of those sentenced to death are indigent.⁴⁹ Figures compiled by the National Association Against Capital Punishment for 1 January 2005, known as "Death Row USA", suggest that of the 3,455 people in America on death row, 46% are white, 42% black and 10% Hispanic. Murder victims were 81% white, 13% black and 4% Hispanic. There were 53 women on death row and 79 offenders who were juveniles at the time of the crime.⁵⁰

As for women generally, there are 566 documented instances of actual executions in America since 1632.⁵¹ In 1692 Massachusetts had the all time yearly record of 14 executions for witchcraft, followed by the execution of 6 slave women in Virginia at the height of the American Civil War in 1863. Oklahoma still comes close in the female death stakes without the existence of a witch-hunt or a Civil War. Oklahoma executed three women in 2001.⁵²

The execution of those with a mental illness is clearly prohibited by international law and most countries accept this position.⁵³ The US Supreme Court held in the 1986 decision of *Ford v Wainwright*⁵⁴ that the execution of such persons is unconstitutional.⁵⁵ In the June 2002 decision of *Atkins v Virginia*⁵⁶, the United States Supreme Court, by a 6 to 3 majority, extended the prohibition to mentally disadvantaged persons. Atkins, convicted of robbery and murder, had an IQ

⁴⁴ ACADP, *ibid*.

⁴⁵ Death Penalty, Amnesty International's Human Rights Concerns, www.amnestyusa.org

⁴⁶ Asia Times, 18 April 2000, www.atimes.com; Amnesty International, *South Asia Should follow Bhutan and Abolish the Death Penalty*, asiapacific.amnesty.org

⁴⁷ *Ibid*.

⁴⁸ See *Lim Hang Seoh v Public Prosecutor* [1977] 1 MLJ 68.

⁴⁹ American Civil Liberties Union Report, *The Anniversary of Furman v Georgia*, *op cit* at p8.

⁵⁰ Death Penalty Information Centre, www.deathpenaltyinfo.org

⁵¹ Streib, V, *Death Penalty for Female Offenders*, 1 July 2003.

⁵² *Ibid* at p 2.

⁵³ Death Penalty, Amnesty International's Human Rights Concerns, www.amnestyusa.org
⁵⁴ 477 US 399 (1986).

⁵⁵ For a general discussion see the *Death Penalty Information Website*, www.deathpenaltyinfo.org

⁵⁶ 536 US 304 (2002).

of 59.⁵⁷

In dissenting, Chief Justice William Rehnquist and Justice Antonin Scalia protested that the majority had been swayed by irrelevant factors such as foreign laws, opinion polls, and views of professional and religious organisations.⁵⁸

Prior to 2002, some mentally disadvantaged inmates came close to execution and it is estimated that 44 mentally disadvantaged people have been executed since 1976.⁵⁹ For example, in the 1990s, a borderline mentally disadvantaged Virginian called David Vasquez confessed to rape and murder. Whilst on death row, he was lucky to escape actual execution. DNA testing four years after conviction identified a serial rapist as the true killer.⁶⁰ It would have been a gross injustice if Vasquez had been sentenced to death in jurisdictions such as Bangladesh and China where defendants are invariably executed as soon as all Court proceedings are exhausted.

China, despite leading in reported executions for many offences, appears to be showing signs of reconsidering its stance. In December 2004, an International Symposium on the Death Penalty was held in China where Zhang Jun, the Deputy Minister for Justice, said that the goal of reform is to set up more long-term prison sentences of 20 to 30 years and thereby reduce the use of the death penalty. Zhang Jun said that the death penalty would be retained though judges would be less likely to resort to capital punishment as a sentencing option. *China Daily* reported on 27 January 2005 that legal experts at the conference argued that China would need to limit the use of the death penalty when it ratifies the International Covenant on Civil and Political Rights. Perhaps China is trying to improve its worldwide image on human rights in light of the impending Olympic Games and for other political reasons.

ASEAN REGIONAL FORUM - RECENT DEVELOPMENTS

Before discussing specific problems with the death penalty in our region, I will briefly outline some recent developments within the ASEAN countries.

⁵⁷ Medical experts suggest that an average IQ is about 100, whereas, mild retardation begins at 70, *Execution Banned for Mentally Ill*, *The Australian*, 22-23 June 2002.

⁵⁸ Heaton, G, *Capital Punishment – Death for the Most Deserving*, (2002) (Vol 27) *Alternative Law Journal* 291.

⁵⁹ *The Australian*, 22-23 June 2002.

⁶⁰ Death Penalty Information Centre, *For 110 Inmates Freed by DNA Tests, True Freedom Remains Elusive*, 28 May 2002, www.deathpenaltyinfo.org. Also see the case of Earl Washington Junior, a black man with an IQ of 69, who confessed to crimes he did not commit, even where there was no DNA to tie him to the crimes. Over ten years later, DNA showed he was wrongly convicted, *DNA Saves Man From Execution*, 12 February 2001, www.cbsnews.com

The Association of South East Asian Nations, established in 1967 to promote regional developments, safeguards and to serve as a forum to resolve differences, consists of Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei and more recently Vietnam. As already observed, these countries retain the death penalty. Australia and New Zealand are members of the ASEAN Regional Forum, though neither have the death penalty.⁶¹

In 1995, following a diplomatic dilemma between Singapore and the Philippines over the execution of a Filipino domestic worker in Singapore for murder, the Attorney Generals of the ASEAN group signed a statement known as the Jakarta Consensus on Co-operation in the Legal Field in which they agreed to exchange information on ASEAN nationals under sentence of death in other countries.

It has been reported that Indonesians sentenced to death in Malaysia have had their sentences commuted to prison terms following pressure from the Indonesian Government.⁶² Needless to say, the Australian Government has requested Asian countries to commute death sentences although this has not always been successful.⁶³

I will further discuss political and diplomatic issues concerning extradition and the international transfer of prisoners in due course and touch upon what more could be done about improving the international transfer of prisoners.

TERRORISM

Many countries have enacted laws in the wake of “9/11” and other atrocities such as the Bali Bombing.⁶⁴ Unlike Australia and New Zealand, most Asian countries provide the death penalty for terrorism offences. In addition, there are extensive powers of investigation, detention and arrest as well as presumptions against obtaining bail. Powers of detention far exceed powers in relation to other crime. For example, in Indonesia, *The Anti-Terrorism Law 15/2003*, enables arrest and detention for six months for questioning and possible prosecution. The pre “9/11”

⁶¹ *The Death Penalty in South East Asia*, 5 June 2001, Amnesty International, www.thinkcentre.org

⁶² Ibid

⁶³ For example, when the Australians, Barlow and Chambers were hanged in July 1986, Australian Prime Minister Bob Hawke called it barbaric. The then Malaysian Prime Minister responded, “*I don’t accept all this accusation of being barbaric. We learned all this from Westerners.*” In fact the first reported executions were in ancient Babylon in the Middle East; Australian Coalition against The Death Penalty, 10 September 2003. WWW.acadp.com

⁶⁴ *The Anti-Terrorism Law 15/2003*, Indonesia; *United Nations (Anti-Terrorism Measures) Regulations 2001*, Singapore; *The Penal Code (Amendment) 2003 and Anti-Money Laundering Act*, Thailand; *The Prevention of Terrorism Act 2002*, India, *The Anti-Terrorism (Amendment) Ordinance 2002*, Pakistan.

Internal Security Acts in Singapore and Malaysia that provide for the death penalty have gained renewed legitimacy in the name of fighting terrorism as well as crime generally.⁶⁵

Naturally, it is trite to say that where there is an atrocious crime, emotionally fired public opinion can suddenly swing in favour of "just desserts". As already mentioned, the popularity of the death penalty has recently sky rocketed in Japan following a spate of murders and in Australia, 9/11 and the Bali Bombing has evoked much emotional debate.⁶⁶ Surprisingly, however, a New York Times poll earlier this year found that 56% of New Yorkers prefer a sentence of life imprisonment over the death penalty for people convicted of murder.⁶⁷ Whilst the citizens of the "9/11" city were not polled over terrorism, terrorism is simply organised and premeditated murder albeit on a large scale. After all, terrorism is loosely defined in most countries and includes offences that would otherwise be dealt with as murder, wilful damage, and arson.⁶⁸

Is it not true that most civilised countries also value human rights whereby support for the death penalty is a contradiction in terms? Should we create a special exception for terrorism? If so, where does one draw the line in choosing which crimes should carry the death penalty? As tritely observed in a 1997 Australian Institute of Criminology report:

*"... there is something illogical in the State employing execution to demonstrate its high regard for the sanctity of human life."*⁶⁹

I do not intend to examine the various moral, religious and emotional justifications for or against the death penalty. Rather, as a lawyer speaking at a conference of lawyers, I intend to logically analyse issues that either alone or together show that the death penalty is not reasonable or rational in the context of any crime including terrorism.

No Deterrence

Statistical evidence shows that the death penalty has not reduced rates of homicide. Most homicides are spontaneous, committed in the heat of the

⁶⁵ Yap Swee Seng, *Submission to the 60th Commission on Human Rights*, Geneva, 5 April 2004.

⁶⁶ Contrast the finding of a national survey by the Australian Institute of Criminology in May 1986 involving 2551 respondents. Only 26% favoured the death penalty for a person who stabbed someone to death with only 17% favouring capital punishment for serious drug trafficking. Potas & Walker, *Capital Punishment*, op cit.

⁶⁷ *New York Times*, 18 February 2005).

⁶⁸ Harold Shipman, the doctor who murdered numerous patients in English hospitals, could arguably be seen as a terrorist if terrorism includes organised murder against the State on significant scale. Yet he would probably not be viewed by the public or in law as a terrorist as he was not a member of a terrorist group or cult.

⁶⁹ Potas & Walker, *Capital Punishment*, op cit at p5.

moment and during domestic disputes when the murderer does not think of the consequences.⁷⁰ Of course, it can be accepted that some murders, and most, if not all, acts of terrorism and drug trafficking are planned and the perpetrators are aware of the consequences. Detailed planning commonly carries a belief by the offender that he or she will not be caught. Some are also prepared to take a risk despite the death penalty. Even where sentences of imprisonment are greatly increased in Australia for drug trafficking, criminals are prepared to take the risk as the potential financial benefit commensurately increases when penalties increase.⁷¹

The motivation for and nature of certain crimes fundamentally comes down to the psyche or political or religious beliefs of the offender. In this regard, it is often said in military circles that knowing the psychology of your enemy is half the battle.

In the so-called "War on Terrorism" it appears that terrorists are neither concerned about killing innocent citizens and are not in the slightest deterred by the death penalty. Rather, death appears welcomed as it makes them martyrs and they will be rewarded in the next world.⁷² Both Western and Eastern history shows us that martyrs and heroes have inspired others to fight a cause whether it be good or evil. An increase in willing martyrs combined with the difficulties in detecting future crimes of terrorism may result in a never-ending conundrum. In short, to execute one terrorist is to reward terrorism. Terrorists are more likely to be deterred if they see their convicted comrades suffering the grim indignities of prison life.⁷³

In relation to the Bali Bomber, the Chief Executive of the Australian Federation of Islamic Councils, Amjad Mehboob, recently stated:

*"Amrozi is not going to go to heaven because he and his supporters think so. The final judgment is from God. He will face his reckoning before God."*⁷⁴

Is it not the case that Moslem terrorists, for example, simply need to be re-educated about the true teachings of the Koran? In other words, is it not more appropriate to address the cause or belief systems of a terrorist or future terrorists?⁷⁵ Some might say it is not possible to negotiate with terrorists.

⁷⁰ Potas & Walker, *Capital Punishment*, op cit.

⁷¹ This was the Queensland experience with the *Drugs Misuse Act* when mandatory life imprisonment was the penalty for drug trafficking. The legislation was amended to make it a discretionary maximum penalty.

⁷² ACADP, 10 September 2003, op cit. Also see references at fn 3 concerning the belief in divinity on the part of some the sarin subway killers in Tokyo.

⁷³ *Force the Martyrs to Live*, The Financial Review, 18 August 2003.

⁷⁴ Sydney Morning Herald, 9-10 August 2003.

⁷⁵ Also see the references at fn 4 concerning the sarin subway murderers. Some of the cult members appear to have doubted the truth of their cause during the course of their trials.

However, after years of terrorism in the UK and Northern Ireland, has not the terrorism been stemmed simply through directly or indirectly addressing various political, religious and moral concerns?

In 1974, the then Secretary of State for Northern Ireland, William Whitelaw, had personally been in favour of the death penalty, however was convinced that it would make the problem worse. To hang IRA bombers would simply strengthen their cause.⁷⁶

Fallibility of the System

In looking back over the Centenary of the High Court of Australia in 2003, Mr Justice Michael Kirby AC CMG, aptly noted that most Australian lawyers, including most judges are opposed to the death penalty: -

"they know, better than anyone else, the fallibility and imperfections of any system of justice.... It is not much comfort having inquiries years after execution which finds a miscarriage of justice and apologises to the family."⁷⁷

In the context of IRA terrorism, it may be recalled that Prime Minister Margaret Thatcher, at the height of her popularity in 1984, was unable to convince the Conservative Party to re-introduce the death penalty for terrorist activities, despite having just survived the bombing of the Conservative Party conference at Brighton. More of us now probably better remember that in 1989, the English Court of Appeal overturned the convictions of the Guilford Four, and in 1991, overturned the convictions of the Birmingham Six. All of these men were apparently the victims of fabricated evidence by those investigating their alleged involvement in bombings during the 1970s. The British system of justice, often claimed (at least by the British) to be the best system in the world, would have sent ten innocent men to the gallows had the death penalty been re-instated in the 1970s.

There are of course, many reported cases of innocent people being convicted and sentenced to death. In the US, for example, well over 100 people have been exonerated since 1973 with some coming within hours of execution.⁷⁸ Because of the breadth of the criminal justice system, there is much room for error or worse still, manipulation, bias, corruption, and simply incompetence on the part of a defence lawyer, assuming there is a right to representation. An American Bar Association study, released earlier this year, found that thousands of suspects, including some facing the death penalty, risk wrongful conviction

⁷⁶ Healey, J, *Capital Punishment – Issues in Society*, The Spinney Press (2004).

⁷⁷ Kirby, op cit.

⁷⁸ ACADP op cit.

because they are pressured into guilty pleas or have incompetent lawyers.⁷⁹ Perhaps the following words of Justice Ruth Ginsburg of the US Supreme Court encapsulate the difficulties that poor and underprivileged defendants can face in defending capital trials:

*"I have yet to see a death case among the dozens coming to the Supreme Court on the eve of execution stay applications in which the defendant was well represented at trial....People who are well represented at trial do not get the death penalty."*⁸⁰

When the death penalty still existed in Australia, the High Court of Australia had at least one occasion to overturn a conviction due to the inexperience and incompetence of a defence lawyer.⁸¹

In Australia there have been several Royal Commissions that have revealed police corruption and what is known as verballing which has resulted in innocent people being convicted. Several years ago in Los Angeles, an inquiry found that that about 100 convicted people were framed by police who planted evidence and intimidated witnesses.⁸² Fresh or exculpatory evidence, of course, may come to light many years after a conviction though this is of no use where an innocent person has already been executed.

No country is immune from misfeasance by persons who know how to manipulate the system, whether they are politicians, police or even Judges. Of course, this is putting aside the prospect of dubious witnesses⁸³ or sources of information such as jailhouse and prison informants, indemnified witnesses, or incompetent police investigations where a crucial witness has not been identified.⁸⁴

⁷⁹ Death Penalty Information Centre, Washington, 22 February 2005, www.deathpenaltyinfo.org

⁸⁰ Justice Ruth Bader Ginsburg, 9 April 2001. American Civil Liberties Union, www.aclu.org/news

⁸¹ *Tuckiar v The King* (1939) 52 CLR 335.

⁸² Kroll, M, *Public Support Weakening, But the Death Penalty Will be Slow to Die*, 16 February 2000, Colorado Springs Independent.

⁸³ See for example, *Davies & Cody v The King* (1937) 57 CLR 170 where a criminal associate of the accused later confessed that he gave false evidence against the defendants who faced the death penalty if their convictions were not overturned on appeal.

⁸⁴ Consider the Queensland Court of Appeal decision of *Condren v R* [1991] 1 Qd R 574 where a confession by a third party was not received at trial though was eventually accepted on appeal as fresh evidence. Also see cases concerning out of Court confessions such as *Donnelly v United States* 225 US 243 (1913), *Chambers v Mississippi* (1973) 410 US 284, *Commonwealth v Colon* (1975) A 2d 554, *Bannon v R* (1996) 185 CLR 1, *R v Zullo* [1993] 2 Qd R 572 & the discussion of Jerrard JA in *R v Freer & Weekes* [2004] QCA 97.

Misfeasance can only be made worse by laws and procedures which are easier to manipulate. For example, the presumption of innocence in Malaysia and Singapore is abrogated by laws that provide that possession of drugs is to be taken as evidence of trafficking unless the contrary is proved.⁸⁵ Of course, the Court system itself may fail to meet international fair trial standards. For example, after the fall of the Taliban regime in Afghanistan, Abdullah Shah, a military commander, was sentenced to death in October 2002 after being accused on human rights violations. His trial took place in a closed Court and no defence lawyer was present.

Some might argue, however, that the criminal justice system in most countries has improved markedly with the advent of DNA testing. The irony is that in the USA, some 110 inmates have been released in recent times due to DNA tests.⁸⁶ Some cases have concerned circumstances where a defendant has “confessed” without DNA testing and DNA testing has later proved them to be innocent. There is always the chance of contamination or human error involved with DNA sampling and analysis. In Washington State, for example, there have been 23 admitted errors over a period of three years.⁸⁷ Even in Brisbane, it was reported in the media on 1 March 2005 that there are concerns over the accuracy of DNA testing in Queensland.⁸⁸ Worse still are concerns where DNA has been planted by dishonest police and other criminals.⁸⁹ In that regard, we will all recall the OJ Simpson case where police had planted DNA at the victim’s residence. Then there is the recent Virginian execution of Roger Coleman where the authorities are refusing to release his DNA testing.⁹⁰

At least the Illinois Republican Governor, George Ryan, made some rational, courageous, humanitarian headway, in 2003, when he spared 157 inmates on death row due to 13 being found to have been wrongfully convicted. Ryan was a nominee for the 2003 Nobel Peace Prize.

It is fair to say that accurate DNA testing combined with other evidence can greatly enhance the reliability of evidence. Indeed, Governor Mitt Romney of Massachusetts is pushing for capital punishment after no actual executions for almost 60 years. The Governor has stated that:

*"Just as science can be used to free the innocent, it can be used to identify the guilty."*⁹¹

⁸⁵ The death Penalty in South East Asia, Amnesty International, 5 June 2001, www.thinkcentre.org

⁸⁶ Death Penalty Information Centre, Washington, 28 May 2002.

⁸⁷ *DNA Testing Mistakes at the State Patrol Crime Labs*, 22 July 2004, Seattle Post, www.seattlepi.nwsourc.com

⁸⁸ *"DNA doubts put cases in jeopardy"* The Courier Mail, 1 March 2005.

⁸⁹ *Crooks may plant fake DNA*, The Sunday Mail, Brisbane, 28 February 2005.

⁹⁰ The Age, 27 June 2001.

⁹¹ Stern, S, *Can You Build a Foolproof Death Penalty?* The Christian Monitor, 5 November 2003.

By contrast, thirteen American States have appointed independent commissions which have found that DNA evidence is not a panacea for what places innocent people on death row.⁹²

Even if we accept the fallacy that DNA testing will guarantee correct convictions, what happens if there is no DNA evidence available? For example, "drive by" acts of terrorism or murder generally leave no DNA at the crime scene. Certain acts of terrorism may in fact destroy or diminish the chances of matching DNA. For example, the Oklahoma Bomber, Timothy McVeigh, was convicted without the assistance of DNA matching. Then there are commonly suicide bombers who die along with their victims. DNA and other forensic evidence are unlikely to link other terrorists who counselled or procured the actual terrorist act(s).

In summing up on the issue of the fallibility of the system, it is perhaps apt to quote the words of Mr Justice John Marshall in US Supreme Court decision of *Furman v Georgia* 408 U.S. 238, 239-40 (1972) where the Supreme Court struck down the death penalty statutes of Texas and Georgia and commuted the sentences of 629 death row inmates after ruling that the manner in which the death penalty was imposed was in cruel violation of the Eighth and Fourteenth Amendments:

"No matter how careful the courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some... Surely there will be more as long as capital punishment remains part of our penal law."

On the well-documented issue of underprivileged minority groups being more likely to fare the worst in the criminal justice⁹³, Mr Justice Douglas stated in *Furman v Georgia*:

"Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows."⁹⁴

Unfortunately, four years later in 1976, the US Supreme Court upheld newly designed penalty statutes in *Gregg v Georgia*. Executions resumed in 1977 and as of June 2003, a large number of people have since been executed in America.⁹⁵

⁹² Ibid.

⁹³ See generally the website for the American Civil Liberties Union, www.aclu.org

⁹⁴ Ibid 251-252.

⁹⁵ American Civil Liberties Union, *The Anniversary of Furman v George*, June 2003.

The Death Penalty itself may cause the Guilty to go Free.

In the Second Reading Speech, when the death penalty was abolished in Queensland, the then Attorney General stated:

“The point now is that juries today dislike hanging men, and guilty men therefore go free. During the period between 1850 and 1879, in England, of the men arraigned for capital offences only 33 per cent were convicted whereas of all the men arraigned for non-capital offences, 76 per cent were convicted which goes to show that the odds are two to one that a man tried for murder will be acquitted whereas they are three to one that a man tried for a non capital offence will be convicted. And bad as those figures are for Great Britain, they are infinitely worse for America, because figures reveal the astounding fact that the odds are eighty to one that a man who commits a murder in America will never be convicted.”⁹⁶

To recall, the Ryan case in Victoria, Australia, the jurors in fact thought the death penalty would not actually be invoked. After the death penalty was abolished in Victoria, the number of defendants being acquitted by juries on the grounds of insanity dropped by 54% over the following five years.⁹⁷ Jurors, of course, form their own views about the system and what might be the implications of their verdicts.⁹⁸ In America, juries, for Constitutional reasons, must decide whether the sentence of capital punishment should be imposed.⁹⁹ The first Constitutional decision in 2002 of *Ring v Arizona* sent shock waves through death penalty States that had legislated for Judges, or a panel of three Judges, to decide the death penalty. One reason for such legislation in the first place was that juries had started to balk at deciding upon the death of another and preferred to return verdicts of life imprisonment, and most jurors would not want to sit on another case involving the death penalty.¹⁰⁰ Furthermore, there were difficulties in getting a unanimous verdict of death from a jury and it was thought that Judges would become accustomed to the role of deciding upon the death penalty.¹⁰¹

In the context of confessions, why would a guilty person openly confess to a crime when they will be executed for the crime? It may very well be that they would have confessed if incarceration alone was the only outcome. Depending

⁹⁶ Ibid at 393-394.

⁹⁷ ACADP, 10 September 2003.

⁹⁸ Richardson, C, *Juries: What They Think of Us*, Queensland bar News, No 14, December 2003, p16.

⁹⁹ *Ring v Arizona* 122 S Ct 2428 (2002); *Summerlin v Stewart* Ninth Circuit of the Court of Appeals, (unreported, 2 September 2003).

¹⁰⁰ Generally see Death Penalty Information Centre, www.deathpenaltyinformationcenter.com. Also see *Juries Balk at Death Sentences*, Sydney Morning Herald, 18 July 2003. It would appear that even if there is apparently high support in some communities for the death penalty, it is a different matter if such supporters have to in fact decide the fate of another as a juror.

¹⁰¹ Generally, see the commentaries concerning *Ring v Arizona* and *Summerlin v Stewart* on the Death Penalty Information Centre website, www.deathpenaltyinfo.org

on the legal system, a person sentenced to so-called life imprisonment may still eventually be released upon parole if considered harmless and rehabilitated or indeed be too old upon release to be a threat to the community.¹⁰²

Terrorists who are in fact prepared to die may relish the martyr mileage that comes with a much publicised trial where the death penalty is inevitable.¹⁰³ What if, however, there was no death penalty? Would they not then be inclined to confess and use the media to further publicise their case? Indeed, it is sometimes the case that a suspect receives the most media attention when initially arrested. After all, there have been many cases in Australia and elsewhere about re-trial publicity.

A terrorist may escape justice if the terrorist escapes to a country which will not extradite the terrorist as he or she may face the death penalty. For example, in Australia, a person is unlikely to be extradited or be the subject of an international prisoner transfer where the suspect or prisoner is likely to face the death penalty.¹⁰⁴ In a similar vein, Canada has refused to extradite suspects to China or States in America where the death penalty applies.¹⁰⁵

The absurd irony is that other countries who oppose the death penalty could become havens for terrorists who are highly sought by countries with the death penalty. Diplomatic relations could sour between Australia and any Asian country with the death penalty where our Asian neighbour has requested the extradition of a suspected terrorist who has committed mass murders in the Asian country. Needless to say, it may then be an absurd situation if the Asian country was then not prepared to commute the death sentence of an Australian National who is a lesser criminal in the broad scheme of things. Furthermore, if Australia was to reintroduce the death penalty solely for terrorism offences then other terrorists may be inclined to commit further atrocities against Australia as a form of pay back.

Economic Considerations

It is an unfortunate reality of our world that I must also address the issue of economic viability of the death penalty. If anything, this is easier to quantify than other arguments against the death penalty.

¹⁰² As regards the sentences of life imprisonment in Australia, see Anderson, J, *From Marble to Mud: The Punishment of Life Imprisonment*, University of Newcastle, 1999. Also see United Nations, *Life Imprisonment*, Vienna, 1995. Other considerations are indeterminate or indefinite sentences as well as extended sentences upon psychiatric and parole board review.

¹⁰³ The Bali Bomber also known as the Smiling Assassin appeared to relish the media attention even when convicted and sentenced to death.

¹⁰⁴ Diplomatic undertakings or conditions upon release can sometimes be requested though these are not binding in law.

¹⁰⁵ Canada appears to have a steadfast policy in this regard. Some fugitives from death penalty States will, accordingly, flee to Canada.

If the death penalty was re-introduced into Australia, it has been estimated that a single capital case could cost taxpayers \$5 million dollars. The current cost of keeping someone in prison for 30 years is \$1.5 million. Of course, life imprisonment sentences may not in fact last 30 years and a person may be released on parole.¹⁰⁶ In America, it is said that it costs an average of US\$3.2 million to execute one person, which is five times the cost of incarceration for life.¹⁰⁷ In most Asian jails, it would be fair to say that the cost of keeping inmates is even less than in Western countries.

On the other side of the coin, why should economic considerations apply to such a human rights issue? Has not the Chinese Deputy Justice Minister impliedly admitted that due to the lack of prisons, China has used the death penalty extensively?

Of course, some States may seek to speed up the death penalty processes and have faster Court systems such as the Speedy Tribunals in Bangladesh, and instances in China where persons are said to have had their trial, appeal and execution dealt with in the same day. According to Karpal Singh, an advocate in Malaysia, the Malaysian Government is “*bent on perpetuating the death penalty.*”¹⁰⁸ A Malaysian Deputy Home Minister was once quoted as saying:

*“The problem with the hanging process is that we have to go through the ritual of appeal. That can take two years. I wish the Pardons Board would make faster decisions so that we can start hanging them.... We plan to hang a person a week.”*¹⁰⁹

However, the cost of inevitable appeals is bound to increase given the increasing number of international conventions and laws within a closer world community. On 31 March 2004, for example, the International Court of Justice declared that the US had violated its obligations under Article 36 of the Vienna Convention Consular Relations (VCCR) in that Texan authorities failed to tell Mexican citizens of their right to consular assistance after being arrested for murder and subsequently convicted and sentenced to death.¹¹⁰ As is the practice of the ICJ, the United States Supreme Court has been requested to review and reconsider the convictions and sentences. The oral argument has been scheduled for 28 March 2005.¹¹¹ Texas has filed a response before the US Supreme Court and is understood to be arguing Constitutional and State sovereignty grounds.¹¹²

¹⁰⁶ ACADP op cit.

¹⁰⁷ Ibid.

¹⁰⁸ Singh, K, op cit.

¹⁰⁹ TIME, 5 August 1985.

¹¹⁰ *Avena & other Nationals (Mexico) v United States of America*, ICJ, 31 March 2004.

Known as the *Medellin* case. See generally, www.internationaljusticeproject.org

¹¹¹ In the case of *Medellin v Dretke*

¹¹² See International Justice Project, *Jose Medellin*, www.internationaljusticeproject.org

CONCLUSION

I have attempted to outline the less emotive reasons why the death penalty is not the answer for curbing serious crime including terrorism. Even if I have not been successful, it is nevertheless gratifying to know that countries continue to debate the various issues and that countries such as China are prepared to consider other options.

In Australia the death penalty debate continues to arise in the media and elsewhere on occasions. For example, Sister Helen Prejean of *Dead Man Walking* fame spoke in Brisbane on 25 and 26 February 2005 in opposition to the death penalty.¹¹³ The core of her belief, apart from religious reasons, is that politics drives the death penalty.¹¹⁴

Only just recently, The Weekend Australian newspaper retold the sorry case of Ronald Ryan's execution in Victoria in 1967. It noted that 8,000 people picketed outside Pentridge Prison and 14,270 people signed a petition trying to obtain clemency albeit in the form of a life sentence.¹¹⁵ The media article was titled "*Goodbye Capital Punishment.*"

At about the time capital punishment was completely abolished in Australia, there were said to have been 114 people executed in one year in South Africa. The year was 1984, and 87 of those people were black, 25 were coloured and 2 were white.¹¹⁶ Nelson Mandela, of course, faced execution for politically motivated offences during South Africa's apartheid years. Indeed the US Government at one stage even suggested that Mandela was a terrorist.¹¹⁷

The point is simply this, there will always be a chance that an innocent and even righteous man may be executed. On the other side of the spectrum, terrorists thrive on martyrdom for their cause. To send them to their death will reward them and incite others to follow them, at a much greater cost of lives to innocent citizens.

A. J. GLYNN S.C.
3 March 2005

¹¹³ *Brave Nun Talking*, The Courier Mail, 25 February 2005.

¹¹⁴ Ibid at p 13. See generally Sister Helen Prejean's website at www.prejean.org

¹¹⁵ "*Goodbye Capital Punishment*" The Weekend Australian Magazine, 26-27 February 2005.

¹¹⁶ Sydney Morning Herald, 1 March 1985.

¹¹⁷ National Lawyers Guild, Oklahoma City University Law School, *NLG Law Student Day Against the Death Penalty*, www.jmbzine.com/nlg