



# Anti–Death Penalty Advocacy: A Lawyer’s View from Australia

**Julian McMahon SC**

Australia

## Abstract

This article reviews the executions of Australians in the region and the Australian responses over the past two decades. Informed by the author’s legal defence role in death penalty cases in Singapore and Indonesia and other countries, the article explores developments in anti–death penalty advocacy since 2015: the parliamentary enquiry, the ‘whole of government’ strategy led by the Department of Foreign Affairs and Trade and the efforts made by Australia and Australians in Asia.

**Keywords:** Death penalty; advocacy; abolition; legal profession; Australia.

## Introduction<sup>1</sup>

This article examines the executions of Australians in recent history and developments in anti–death penalty advocacy since 2015, including the parliamentary enquiry, the ‘whole of government’ strategy led by the Department of Foreign Affairs and Trade (DFAT) and the advocacy efforts made by Australia and Australians in Asia.

These recent developments reflect the final wishes of the two Australians executed in Indonesia on 29 April 2015: Myuran Sukumaran and Andrew Chan. I often discussed with them their hope, if they were to be executed, that from the furore and fight to save them, there would emerge a stronger determination to oppose executions everywhere, especially in Indonesia. That hope was one of the reasons they determinedly carried themselves with dignity—so that the senselessness of their executions would be more obvious.

I come to this debate as a foot soldier, a barrister who (with some other Australians) has spent years fighting for clients on death row. That ongoing work grew from a single moment I experienced in Singapore. My senior colleague Lex Lasry QC and I were at Changi prison the afternoon before our client Van Nguyen was to be hanged. We waited for Van’s mother and brother to emerge from their last visit with the son and brother they loved so much. As they walked towards us along a tunnel in the prison, I heard a sound I did not understand. When they came closer, I realised it was the sound of uncontrollable grief. The reality of the horror I was witnessing hit me. Here was the state methodically, with much deliberation and premeditation, carrying out the killing of a healthy young man, a reformed prisoner. Not only was the state killing Van—it was destroying his family. Each and every year since, many hundreds, sometimes thousands, worldwide have suffered the same fate, while many thousands more languish and suffer on death row, sometimes enduring terrible atrocities. This article briefly reviews Australia’s response to these realities. I start with the story of Van Nguyen.



Except where otherwise noted, content in this journal is licensed under a [Creative Commons Attribution 4.0 International Licence](https://creativecommons.org/licenses/by/4.0/). As an open access journal, articles are free to use with proper attribution. ISSN: 2202-8005 (Online)

## Van Tuong Nguyen

On 2 December 2005, Melbourne man Van Tuong Nguyen was hanged in Singapore, having been convicted of the attempted trafficking of almost 400 grams of heroin from Cambodia to Australia via Singapore. At the moment of Van's death, a vigil was held outside the County Court of Victoria in Melbourne, attended by many members of the Victorian legal community, and a minute of silence was observed (Cooke 2005). At St Ignatius Church in Richmond, the parish attended by Van as a child, the bell tolled 25 times to mark each year of the young man's life, and a special prayer vigil was held by then-prison chaplain Peter Norden, who had spent decades fighting the death penalty (Australian Broadcasting Corporation [ABC] News 2005). Van's funeral was held at St Patrick's Cathedral, Melbourne. It was overflowing. Not only was all standing room taken in that vast cathedral—the crowd overflowed out the doors into the surrounding grounds. It begs the question: why so much attention?

Van's Australian legal team was led by Lex Lasry QC, now a retired supreme court justice, and I was his junior barrister. Van had been arrested in December 2002. A few days later, Kim Nguyen, his mother, without resources (she had fled the war in Vietnam and arrived in Australia via a refugee camp with baby twin boys), was brought to me by a friend of hers, a court translator—our involvement began from there. I asked a well-regarded Melbourne solicitor, Theo Magazis, to help and then asked Lex to help. Over the next 11 months before the trial began, we engaged in extensive negotiations, which included strong support from DFAT and foreign minister Alexander Downer. But, a day before the trial, we received a one-line letter saying the case could not settle and would proceed. What that really meant was that a quasi-legal/political decision had been made that Van would go to trial and eventually be executed. Since he had confessed to police the substance of his offending, he would almost certainly be found guilty and automatically sentenced to death under Singapore's disgraceful mandatory sentencing laws. It was clear from the day before his trial that Van's execution was virtually inevitable. Singaporean advocate Joseph Theseira fought the trial. His leader, the legendary Singaporean advocate Pala Krishnan, had tragically died while visiting us in Melbourne to prepare for the case. The sentencing judge could not hold back his tears as he pronounced the death sentence.

Van was executed on 2 December 2005, almost three years to the day after he was arrested. In that time, we made unusual (for Australian criminal barristers) but limited forays into the media to try to retain some public interest in the case and maintain at least some level of support. As criminal lawyers, this is a strategy we would never employ for an Australian case. But, this case was offshore—juries had long been abolished in Singapore and, thus, improper influence was not an issue; the lawyers fighting in court were Singaporean, and the case would inevitably end with a purely political moment: namely, the political decision whether to grant reprieve from execution. Accordingly, a public presence was needed. Once the sentence of death had been handed down and affirmed in the Court of Appeal, whether Van would hang was purely a political question. It was up to the prime minister and his Cabinet to advise the president, who would act as advised. We engaged in the difficult task of making sure Van's case was known and understood without putting inappropriate pressure on the government of Singapore, which was, and still is, a government very friendly to Australia. The two countries were close trading partners, and many Singaporeans were educated and settled in Australia. Since the law could not save Van, perhaps the deep and genuine friendship between the two countries could.

Over the three years of Van's detention, especially during the months leading to his execution, the public slowly came to know Van's mother Kim Nguyen. Her pleas in the English language she struggled with, together with her terrible anguish, won the interest and eventually the support of many. Her life story—of being a refugee, a hard worker and a loving mother—attracted attention to Van's case. Van, too, had made enormous strides in prison; through his friends, much of this became known to the Australian public. The thought of spending life in prison filled Van with despair. However, he was determined to do all he could to help win his case to spare his mother the pain of having her son executed.

Central to Van's mental and spiritual health was an elderly Singaporean nun, Sister Gerard Fernandez of the Good Shepherd Sisters. As a young child, she decided to work for those on death row and has spent most of her life doing this. She is endlessly gentle and laughing. As a prison chaplain, she caught Van's attention while singing to another prisoner on death row. They became very close, and she was with him through his last hours. Her work and that of Peter Norden, then a prison chaplain in Melbourne, among others, brought two Popes—John Paul II in February 2005 and Benedict XVI in November 2005—to intervene with the Singaporean government on Van's behalf—but to no avail (Norden 2021: 163).

Van was also fortunate to have some very capable DFAT officers working in Singapore at the time. The high commissioner Gary Quinlan, who went on to become one of Australia's most senior and effective diplomats, would do his best to open any door for us lawyers. Among his staff was Annette Morris, who maintained regular visits to Van. Van was vulnerable and fragile at times, which Annette well understood as she supported him through those three lonely years in prison.

As we worked on many fronts to try and save the day, hoping to hear some good news, the dreaded letter was received by Kim Nguyen, Van's mother, in late November 2005 at her home address. She had some idea what the letter meant and had to ring a friend of Van's to rush over and translate it for her so that she could be sure. It read:

Dear Madam, 1. This is to inform you that the death sentence passed on Nguyen Tuong Van will be carried out on 2 Dec 2005. 2. We will arrange for additional visits from 29 Nov till 1 Dec 2005. Approved visitors may register for their visits between 8.30am and 9.30am and between 12.30pm and 1.30pm at the Prison Link Centre, Changi (990 Upper Changi Road North Singapore 506968). 3. You are requested to make the necessary funeral arrangements for him, however if you are unable to do so the state will assist in cremating the body...

By 2 December 2005, there was strong support in Australia for Van to be given a reprieve. In large part, I attribute this to two factors. First was the influence Lex Lasry QC had at press conferences. Due to his standing in public life, the media paid attention to him. This meant that on many occasions, the message got through. Second, Kim Nguyen, an achingly sad mother who established a unique presence in media, had become the real face of that message—she moved hearts.

The day before Van was hanged, as we walked out of the prison after the last visit, I was blunt to the waiting media, saying 'he is completely rehabilitated, completely reformed, completely focussed on doing what is good and now they're going to kill him'. In Singapore, we had been refused permission to be present with Van at his hanging to support him in that moment. But, at the appointed time, as Lex and others sat with Van's mother, I went with Van's twin and some of Van's close friends to Changi prison. The media scrum was enormous and, for a while, quite intense and crowding. I pointed out to the media that Van's brother was there at the gate standing in solidarity with his brother, who was about to be hanged, and that he deserved their quiet and some space. There were also many Australian media there; they certainly had a real presence and effect in changing the situation, making it quieter and more dignified.

Despite having previously been refused access to the prison for the 6am hanging, suddenly that changed—at about 5.45 am, we were allowed in. Perhaps someone had realised that the suffering of Van's twin brother and young friends at the gates of the prison, in front of an enormous crowd of journalists, would not make for good international TV. Whatever the reason, the gates opened, and we were ushered into a small visitor's room and allowed to stay there in peace. Soon after 6 am, it was apparent—only because of the time and expressions on the guards' faces—that the deed had been done, and the young Australians were ushered out. After they left, I lingered and spoke to quite a group of assembled guards and bureaucrats who were watching and waiting for me to go. Many of them were betraying bleary eyes and much sadness. Van was often a barrel of laughs and quick-witted, and we knew that some of his guards and prison staff had been good to him. I simply asked them to pass on a message to their superiors—that if executions were a right and proper thing to do, they should come along to the next one and bring their families to show them what it was all about. I knew by then of the shame people felt as the machinery of justice locked them into killing a prisoner rendered helpless by ties and a hood.

The significant support Van received in the fight against his death penalty was part of a broad shift occurring in Australia. I am not qualified to make the assessment or analyse Australia's capacity for racism, but I do think the sentiment shifted from 'he is nothing but an Asian drug trafficker' to 'he and his family are Australians, and we don't want him to be executed'. In Van's case, the sense that the accused facing death was 'the other' shifted. A similar shift was later to occur more slowly for the next Australians on death row: Myuran Sukumaran and Andrew Chan, members of the so-called 'Bali 9' arrested in April 2005, who were originally framed as Asian drug dealers. It ended with the open acceptance that they were Australians and that their fellow Australians would stand up for these young men who, having turned their lives around within prison, deserved to be punished but not executed.

## **Andrew Chan and Myuran Sukumaran**

### ***Events in Indonesia***

In early April 2005, the Australian Federal Police (AFP) wrote two letters to their Indonesian counterparts, advising them to watch and take appropriate action against a group of young Australians visiting Bali. Although part of the letters allowed for 'holding off', one of the letters to Indonesian police also advised that '4. should they suspect that CHAN and/or the couriers are in possession of drug at the time of their departure that they take what action they deem appropriate'. Further, the strategic arrest advice from the AFP officer advised: 'I therefor [sic] request that you consider searching NYUYEN [sic], CZUGAJ and RUSH soon after the first group are intercepted'.<sup>2</sup> The suspicion was drug trafficking. On the arrest day, 17 April 2005, the group was found with over eight kilograms of heroin. The penalty for the ringleaders was always going to be death or decades of (if not life) imprisonment.

The AFP has never accepted that their letters (which I have read) were an error of judgement—which they plainly were. Given the knowledge and skills of the AFP, the capacities for surveillance, and the tight controls at border entry points for people flying back into Sydney airport, the group easily could have been arrested red-handed upon return. This is bread-and-butter work for the AFP, who are often involved in much more complex and dangerous work.

When the group was arrested, there was a media frenzy. Schapelle Corby, by then a well-known face in Australia, had been arrested in 2004 for drug trafficking into Bali. The dramas surrounding her family, her arrest, detention, representation and trial are beyond the scope of this article—but, in short, it was a prime-time circus. Consequently, by April 2005, on the question of young Australians and drugs in Indonesia, there was much tension in the air. The trials of the Bali 9 moved very quickly. On 14 February 2006, Sukumaran and Chan were sentenced to death. The other seven all received lesser sentences. Over the next few years, during the appeal processes, four more of the Bali 9 were sentenced to death; however, by 2011, all those sentences were reversed to life imprisonment. By the end of 2011, only Sukumaran and Chan remained on death row.

The first two major appeals of Chan and Sukumaran also moved fast. By September 2006, their February death sentences had been unsuccessfully appealed to the High Court and the Supreme Court of Indonesia. During that time, the families of Chan and Sukumaran approached Lex Lasry QC to become involved. Once again, I was to be Lex's junior. But, as history was to reveal, the damage was done, and it was too late.

By the end of 2006, we had obtained the help of an eminent Indonesian lawyer, Todung Mulya Lubis. He had a team of outstanding young Indonesian lawyers—brilliant, ethical and ferociously hard-working. That team was to go on and test the boundaries of Indonesian constitutional and death penalty laws over the nine years they worked on the case. Over those years, the lawyers and others waged a struggle on many fronts—at times, success was tantalisingly close. For instance, in 2007, after months of hearings with expert witnesses from numerous countries, the Constitutional Court of Indonesia was almost evenly divided, but against us, on the question of whether the death penalty remained constitutional given recent human rights amendments to the Constitution.

But, ultimately, the question of proceeding with the executions, as usual, came down to politics. The new President, Joko Widodo, had come into office in October 2014. Although (to our knowledge) he had not previously expressed views about the death penalty, he and his new Attorney-General soon began to discuss it as an important weapon in the fight against crime. In January 2015, after two decades where executions were rarely used, six prisoners were executed. Only one of those six was from Indonesia; the others were from the Netherlands, Brazil, Vietnam and Africa. This meant that the global media was paying attention, and the executions attracted enormous attention.

Within days of those executions, Sukumaran and Chan received rejection letters refusing their clemency applications. Their deaths were apparently imminent. Over the next three months, there was intense activity to try and save them, but we failed. They were shot dead early on 29 April 2015 in a field on the prison island of Nusukambangan, off the south coast of Java. Majell Hind, an experienced Australian DFAT officer who had been central in the fight to save them, together with two lawyers from the Australian team, Veronica Haccou and myself, were down the road. We heard the roar of 96 rifle rounds as eight men were executed simultaneously by separate firing squads of 12 soldiers. We were not permitted to be with our clients in the final hours. Just behind a screen, at the scene and with them until almost the end, were two Australian chaplains—Christie Buckingham for Myuran and David Soper for Andrew. Until the last few hours, other Australian lawyers, Michael O'Connell SC and Alex Wilson, were in Jakarta working with the Indonesian legal team to utilise legal options that were still available. In the mix was the very recent and previously untold allegation by the local 2005 trial lawyer for Chan and Sukumaran that the trial process had been tainted by corruption. Just days prior to the execution of Chan and Sukumaran, lawyer Muhammad Rifan made the allegation that the judges who applied the death sentences had asked for a bribe of more than \$130,000 in exchange for a lesser prison sentence for the men (Allard 2015). An investigation into judicial corruption had been underway in Indonesia two months prior to Rifan going public with his accusation. Rifan had made the decision to make his allegations public as they had apparently not been paid adequate attention by the enquiry (Allard 2015). Neither he nor Chan nor Sukumaran had been interviewed for the investigation despite providing affidavits. Additionally, a relevant constitutional challenge was underway, listed for a May court date. But, the sweep of history had its way.

This article is not about the events in Indonesia. They are complex and multi-layered. For instance, few discussions of the death penalty in Indonesia at that time did not reference what was perceived as a growing drug crisis. Also front of mind were penalties for terrorist atrocities in Indonesia, which themselves had claimed the lives of many Indonesians and Australians. Some convicted terrorists had been executed in recent years—three of the Bali bombers in 2008—while others had been spared, such as Abu Bakar Bashir, their alleged ringleader. But, the April 2015 executions were a pivotal turning point in the story of the death penalty in Australia.

As the initial media storm and sentences of Chan and Sukumaran left the media cycle in 2006, their new legal team took over. All those involved until then were replaced. Mulya Lubis became the key lawyer. In Australia, Lex Lasry QC was appointed to the Supreme Court of Victoria in October 2007, and a new team was assembled in Australia to act for Chan and Sukumaran. Apart from acting for the clients in the usual ways, their role was primarily as a legal support role for Mulya Lubis. Over the years, the team did an enormous amount of legal work, as well as acting as liaison between all those involved—the clients, their families, the Indonesian lawyers, DFAT, academics, Australian politicians, supporters offering practical help, interested Australians and others from around the world, and the media. The interplay between all those groups changed how Australia understood the death penalty.

### ***Australian Law and Politics***

By the time of the April 2015 executions, Australia was announcing to the world through its politicians that it was unequivocally opposed to all executions, everywhere. Legally, the genesis for this position could be found in a succession of key steps. In 1973, the Commonwealth Government abolished the death penalty for the Commonwealth and most of its territories. However, the states could still make their own decisions—although none went on to execute after 1967. As a long-time signatory (since 1972) to the International Covenant on Civil and Political Rights, one of the world's most important documents on human rights, in 1989, Australia took the step of signing the Second Optional Protocol to that Covenant, which concerns the abolition of the death penalty everywhere. In 2010, the Commonwealth legislated the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) to prevent any of the states from reintroducing the death penalty. Thus, the legal architecture was in place. Theoretically, at least, Australia had abolished the death penalty everywhere in Australia such that it could not (easily) be reintroduced and had signed up to pushing for international abolition through the Second Optional Protocol.

However, despite that architecture, the position of Australian leaders had waxed and waned to some extent. For the first part of the 21st century, most of our national political leaders were sitting awkwardly between defending any Australian facing execution and not offending other countries who planned to execute their own offenders. The Hawke government had fought hard to save Barlow and Chambers in Malaysia in 1986, but the execution of McAuliffe in 1993, also in Malaysia, was a much more subdued event. Following the deaths of 88 Australians in the Bali bombings of October 2002, there was an almost universal lack of sympathy towards convicted Indonesian perpetrators facing execution. Prime minister John Howard, in a discussion on the fate of the Bali bombers, suggested that it was open for the Australian states to reintroduce the death penalty (*Sydney Morning Herald* 2003)<sup>3</sup> and expressed his support for the execution of Ali Amrozi bin Haji Nurhasyim, one of the perpetrators of the attack. Howard said, 'if the law of Indonesia requires that he be executed, then I regard that as appropriate ... I do not intend ... to ask the Indonesian government to refrain' (*Sydney Morning Herald* 2003). Similarly, John Howard and opposition leader Mark Latham expressed the view that the execution of Saddam Hussein, who had been captured in Iraq in December 2003, was 'appropriate'; 'if the Iraqi people decide that, I would certainly not object', said Howard (Solly 2003). Later, John Howard affirmed his 'respect [for] the right of other countries to decide their own penalties' (*ABC News* 2004) and called the trial of Hussein 'a triumph' (*ABC News* 2006). Hussein was executed in December 2006.

Despite events in Indonesia and Iraq, there was significant support developing through the same period for Van Nguyen, executed in Singapore in 2005. This included support from Alexander Downer. His shadow minister Kevin Rudd was firmly opposed to the execution—indeed, to all executions—and, although barely audible, there was opposition from John Howard. It may be that the ongoing unfolding legal cases in Indonesia and Iraq, of the Bali bombers and Saddam Hussein, affected John Howard's tactical consideration of what he would say about the death penalty generally. John Howard's clear support for the executions of Saddam Hussein and the Bali bombers made any protest on behalf of Van Nguyen rather hollow, being based on nothing but the fact that he was Australian. John Howard later claimed that 'what other countries do with the death penalty is [their own] business' (*The Age* 2006) while also stating that his government would 'be unrelenting in standing up for Australians' facing the death penalty overseas (Smiles and Forbes 2007).

While opposing the execution of Van Nguyen, Alexander Downer refused to lobby against the executions of the perpetrators of the 2002 Bali bombings, stating that anger towards them 'knows no bounds' and that they ought to have known they would face execution 'in a country like Indonesia' (*ABC News* 2007). His successor after a 2007 change of government, Stephen Smith, expressed similar sentiments, saying that it was 'a matter for the Indonesian authorities' (*Sydney Morning Herald* 2008).

Kevin Rudd's consistent opposition to the death penalty faltered when it came to the Bali bombers, as he drew (like Howard had done) a distinction between Australians and non-Australians executed overseas (*ABC News* 2008). The views of prime ministers Julia Gillard (2010–2013) and Tony Abbott (2013–2015) were consistently positive towards Chan and Sukumaran, with Gillard willing to intervene personally to save the men (Berry 2011) and Tony Abbott speaking of the reformed men as being deserving of mercy (*ABC News* 2015). However, in 2010, Tony Abbott had indicated some openness to executions,

stating that there may be ‘crimes so horrific’ that the death penalty is the only appropriate punishment and that if it came before parliament, it would be a conscience vote (*ABC News* 2010).

The effect of the various prevarications of Australian leaders over some 10 years was to allow others in Asia to voice criticism of Australia’s position. For years, Australian lawyers had been saying whenever we could be heard that Australia must adopt a more consistent approach to the question of executions. We insisted Australia had to consistently say it was opposed to all executions rather than pick and choose which ones it opposed or was comfortable with. That was the only way forward—to show that our national position was not merely opportunistic. If executions were unacceptable, that needed to be a principled position in accordance with both the international documents Australia had already signed and the legislation it had passed.

### ***Australian Civil Society***

Many people went out of their way to offer support to Chan and Sukumaran. Australian artists Ben Quilty and Matthew Sleeth mentored Sukumaran, who eventually had his paintings exhibited in Sleeth’s Brunswick gallery. Sukumaran became a prolific artist, painting portraits of then-president of Indonesia Susilo Bambang Yudhoyono, various Australian politicians, and Chan and other prisoners. Sukumaran also gave art classes and workshops to fellow inmates, assisted by Quilty and Sleeth. His passion for art is beautifully explored in *Guilty*, a documentary film that chronicles the final 72 hours of Sukumaran and Chan’s lives. Produced by Maggie Miles, the film was screened nationally on World Day Against the Death Penalty in 2019 and at conferences in numerous countries. Community worker Mary Farrow, then coordinator of Emerald Community House outside of Melbourne, was a key person among many in assisting Sukumaran and Chan in developing programs for the inmates at Kerobokan and, like others, made multiple trips to Bali to provide support.

By 2015, support for Chan and Sukumaran became widespread within Australia. Conservative commentators and radio presenters such as Alan Jones were against the executions (Robertson 2015).

A wide range of personalities from across the political spectrum, including members of parliament (MPs), artists and celebrities, spoke out against the executions (Kimmerley 2015). Ben Quilty, with whom Sukumaran was particularly close, together with the Mercy Campaign (discussed below), organised Music for Mercy for 29 January 2015, a concert in support of Chan and Sukumaran, featuring many leading Australian performers. Hosted by David Wenham, there were performances from Megan Washington, Kate Miller-Heidke, The Church frontman Steve Kilbey, Paul Mac, Jenny Morris, Josh Pyke, Rob Hirst of Midnight Oil, Glenn Richards of Augie March and Julian Hamilton, among others. Vigils were held across the country on 18 January. Federation Square in Melbourne saw performances from Missy Higgins, Clare Bowditch and Bob Evans. Lex Lasry QC spoke, and federal Labor opposition leader Bill Shorten was in attendance. In Western Sydney, Ben Quilty organised a vigil with speakers Craig Reucassel of *The Chaser* and Alan Jones. Outside the Adelaide Supreme Court, members of the legal profession held a minute of silence. Wesley United Church in Perth also held a vigil for the condemned men. Other events sprang up in local communities. Involved in many of these initiatives was the Mercy Campaign. Driven principally by Melbourne lawyer Matt Goldberg and journalist Brigid Delaney, from what was then Reprieve (Australia), later to become the Capital Punishment Justice Project, the Mercy Campaign organised widely at a grassroots level, linking and supporting initiatives and lobbying MPs. Their Petition for Mercy, addressed to the Indonesian President, obtained over 250,000 signatures. The entire movement had a very simple message: whatever punishment the condemned men deserved, the death penalty should be off the table. Executions had become unacceptable to Australia as a community and as a nation.

### ***The Final Political Step***

Bipartisan support for Chan and Sukumaran was demonstrated through the joint efforts of then-foreign minister Julie Bishop and shadow foreign minister Tanya Plibersek. In February 2015, both members made moving speeches in parliament against the looming executions highlighting the personal rehabilitation of the two men (Commonwealth of Australia 2015). In her speech, the foreign minister acknowledged the support from the Opposition and the Greens. She noted that five successive prime ministers had made representations to Indonesia to save the lives of Chan and Sukumaran, over 100 parliamentarians had signed a joint letter to the Indonesian ambassador and over 30,000 Australians had written to the Indonesian President. Perhaps most importantly, she noted Australia’s strong opposition to the death penalty, at home and abroad. In her reply, Tanya Plibersek, as the shadow foreign minister and deputy leader of the Australian Labor Party, noted Australia’s united renunciation of the death penalty in Australia and around the world. Other MPs known for their opposition to the death penalty gave powerful speeches, including Chris Hayes (long-time co-chair of the Parliamentary Group Against the Death Penalty with Senator Dean Smith), Phillip Ruddock and Melissa Parke. The significance of the unified presentation from both Julie Bishop and Tanya Plibersek cannot be overstated. It gave freedom to all other MPs to follow suit and showed the unity of the parliament on the fundamental issue.

Quite a few Australian journalists worked hard over the years to win the trust of the prisoners, families and lawyers as they all navigated the stormy seas of high-profile, dramatic and tense situations. Consequently, the media gradually obtained more information and insight into the cases, the clients and the legal debates. In turn, this allowed them to bring the stories of prisoners on death row into the lives of Australians in a vivid and informed manner. Given the personal qualities of Andrew Chan and Myuran Sukumaran, this worked to their advantage in persuading the public, and the politicians, that the struggle was meritorious and worth the effort.

### ***2016 Report by the Joint Standing Committee on Foreign Affairs, Defence and Trade***

Following the significant Australian Government efforts to save Chan and Sukumaran, there was plainly an opportunity to advance Australia's approach to executions. The machinery of government needed to be ready for whatever the next case or cases might be.

An inquiry into the death penalty was referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) by foreign minister Bishop. JSCFADT referred the project to its Human Rights Sub-Committee, chaired by Phillip Ruddock MP (Parliament of the Commonwealth of Australia and JSCFADT 2016: 2). It was fortuitous that Ruddock was the chair because he had been an active voice against the death penalty his whole career and was well aware of how many of the arguments are framed. The Committee toured the country, taking written and oral submissions from a wide range of interest groups and individuals. In 2016, JSCFADT tabled its report, *A World Without the Death Penalty: Australia's Advocacy for the Abolition of the Death Penalty* (the Report). As the foreword to the Report stated, 'we must continue to campaign in a strong and consistent manner to rid the world of this cruel practice for all time'.

The Report made 13 recommendations, to which the government responded in March 2017. All but one of the 13 recommendations were accepted in whole, in part or in principle. One was rejected with an alternative approach suggested. The Report was a success, and the recommendations were far-reaching. They steered Australia onto a path of serious ongoing commitment to abolition by principled and targeted action.

The key recommendations included the review and improvement of relevant legislation and mechanisms for government and the AFP, how they might deal with likely death penalty cases, how they might work with other jurisdictions as the various phases of an operation unfolded, and how Australia could engage with non-government organisations (NGOs) and others in the region who work against the death penalty. Importantly, it was recommended that there be focused funding of various death penalty works by civil society both here and in the region and that DFAT coordinate and develop a 'whole of government' strategy for the abolition of the death penalty.

### ***Department of Foreign Affairs and Trade: Australia's Strategy for Abolition of the Death Penalty (June 2018)***

As a result of the above recommendations, in 2018, DFAT developed a 'whole of government' strategy outlining the national approach to the global abolition of the death penalty. The strategy states that Australia opposes the death penalty 'in all circumstances for all people' (DFAT 2018: i)—an unprecedentedly strong policy stance advancing the international trend in favour of global abolition.

The strategy outlines three levels of advocacy: bilateral, multilateral and civil society engagement. Bilateral advocacy includes the briefing of other governments by our diplomats on the use of the death penalty in their post countries; the raising of the death penalty as a human rights issue with the heads of retentionist countries on a regular basis; and public diplomacy, including social media engagement and cultural diplomacy aiming at informing and influencing attitudes towards the death penalty (DFAT 2018: 5–7). Multilateral advocacy involves relevant engagement with organisations such as the United Nations, Association of Southeast Asian Nations and Pacific Islands Forum, as well as the Commonwealth (DFAT 2018: 8–9). Civil society engagement involves establishing a consultative group on the death penalty to share advocacy priorities, coordinate responses to individuals facing the death penalty and facilitate the exploration of opportunities for joint public diplomacy (DFAT 2018: 10).

The existence of this 'whole of government' strategy is significant (Sato, this volume). It puts Australia into active engagement with the death penalty as a global and, particularly, a regional human rights issue. It shows Australia's willingness to work and, if necessary, lead in the Asia-Pacific region on the issue of abolition and highlights the importance of friendship with regional partners while maintaining a consistent approach to the death penalty and abolition. It underscores and prioritises the importance of providing support to lonely voices in difficult circumstances. I have seen Australia's diplomats lending presence and support across Asia, at public conferences, through meetings with advocates and attending cases at court to show Australia's interest in and support for either abolition or the accused. On occasion, DFAT will signal their presence and support at events

deliberately and effectively, as anti-death penalty advocates in retentionist countries argue publicly and courageously for law reform.

### ***Australian Federal Police and Police-to-Police Assistance***

DFAT's strategy for abolition does not address cooperation by the AFP with authorities in executing countries. The provision of assistance to foreign law enforcement agencies by the AFP is governed by the *Australian Federal Police Act 1979* (Cth) and Ministerial Direction (*Australian Federal Police Act 1979* (Cth): s37(2); AFP: Governance). Procedures for when the death penalty may be involved are covered in the *AFP National Guideline on International Police-to-Police Assistance in Death Penalty Situations*. This Guideline has been the subject of regular revision over the past 20 years and has attracted some criticism. However, it is beyond my scope here to review it. The Guideline requires a wide range of factors to be considered by police—and, in cases where the risk is more imminent, by the minister responsible for the AFP—when considering the transfer of information to foreign police in places where arrest and conviction may lead to execution. The chief complexity turns on what stage the process is at—pre-charge, arrest or trial—and then assessing risks involved to both the target and Australia's national interest.

### **Civil Society Projects**

As to the present and future, it is appropriate to set out a small number of key groups, both as a snapshot and to provide interested readers with places to go for further information. At a national level, the Law Council of Australia published in October 2021 its authoritative updated Statement on the Death Penalty with a strong focus on international law. The Capital Punishment Justice Project (CPJP) is Australia's leading abolitionist NGO, led by Stephen Keim SC, working with partners across Asia to fight the death penalty. CPJP typically works with local in-country lawyers and organisations who are acting for their clients on death row or engaged in policy and provides legal support by engaging Australian barristers and solicitors who all work pro bono to assist the in-country lawyers—and not only in Asian countries (disclaimer: I am the current Chair of CPJP's Council of Ambassadors and the former president of CPJP). Under the auspices of CPJP (formerly known as Reprieve Australia), volunteer lawyers have provided thousands of hours of pro bono casework to under-resourced defence lawyers doing capital cases in many jurisdictions, particularly Asia and the southern states of the United States.

In partnership with CPJP, in 2020, the Law Faculty at Monash University founded Eleos Justice, an academic unit exclusively for research, teaching and advocacy aiming for abolition. Its purpose is to become a leading hub for fighting the death penalty and other forms of state-sanctioned killing in the Asia-Pacific region. It will be a fountain of resources and support for anti-death penalty lawyers, academics, MPs and intellectuals in the region who need solid intellectual support for their work. Its first projects have included the milestone report, *State-Sanctioned Killing of Sexual Minorities*, a major and original work on the killings of sexual minorities where states are directly or indirectly involved, and, more recently, another unique report, *Killing in the Name of God*, which deals with state-sanctioned violations of religious freedom. Eleos Justice's teaching arm is the Eleos Anti-Death Penalty Clinic, where students conduct casework research and anti-death penalty advocacy and assist legal teams across various death penalty jurisdictions. The students' work has been of great value to under-resourced and pressured advocates in the region.

In addition, through its public seminars, the Asian Law Centre (ALC) based at the University of Melbourne has regularly invited leading academics from across Asia and Australia to give research papers on current debates concerning executions, which are published as ALC Briefing Papers.

### **Conclusion**

Fifty-five years after Ronald Ryan's execution and 100 years after Queensland led the way with abolition, Australia is now positioned as an active anti-death penalty nation. At a parliamentary level, through DFAT, through Eleos Justice, other universities, CPJP and other NGOs, Australia is now engaged on many fronts to rid the world of the death penalty. This is one human rights fight among many. While there is no guarantee that human rights will improve, or that executions and state-sanctioned brutality will not become more common, the story of the death penalty in Australia shows that struggles of this kind can be won. We cannot do everything—but what we can do, that much at least we should do.



<sup>1</sup> For their research assistance, I would like to thank Audrey Thoman, Elliot Freadman, Sophie Thompson and Maximilian Plitsch.

<sup>2</sup> Extracts of the letters may be found in *Rush v Commissioner of Police* [2006] FCA 12.

<sup>3</sup> In an interview with prominent radio host, Neil Mitchell, Howard stated that he ‘couldn’t pass a law to apply the dealt [sic] penalty for example in the state of Victoria. You can raise, and this matter can be pursued at a state political level, you say why haven’t you got the right? Well that’s up to the Victorian Government’ (*Sydney Morning Herald* 2003).

## References

- Agutter R (2015) Adelaide Gaol. *History Trust of South Australia*. <https://sahistoryhub.history.sa.gov.au/places/adelaide-gaol>
- Allard T (2015) ‘They asked for \$130k and then more’: New claims of bribes in Bali nine duo death penalty case. *Sydney Morning Herald*, 27 April. <https://www.smh.com.au/world/they-asked-for-130k-and-then-more-new-claims-of-bribes-in-bali-nine-duo-death-penalty-case-20150427-1muem1.html>
- ABC News (2004) PM won’t oppose death penalty for Saddam. 2 July. <https://www.abc.net.au/news/2004-07-02/pm-wont-oppose-death-penalty-for-saddam/2002944?pfm=ms>
- ABC News (2005) Nguyen hanged in Singapore. 2 December. <https://www.abc.net.au/news/2005-12-02/nguyen-hanged-in-singapore/753216>
- ABC News (2006) Howard hails Saddam verdict. 6 November. <https://www.abc.net.au/news/2006-11-06/howard-hails-saddam-verdict/1302470>
- ABC News (2007) Govt won’t appeal against Bali bombers’ executions: Downer. 29 September. <https://mobile.abc.net.au/news/2007-09-29/govt-wont-appeal-against-bali-bombers-executions/684470?pfm=sm>
- ABC News (2008) Rudd firm on capital punishment stance. 3 October. <https://www.abc.net.au/news/2008-10-03/rudd-firm-on-capital-punishment-stance/530530>
- ABC News (2010) Death ‘appropriate’ for mass murderers: Abbott. 20 February. <https://www.abc.net.au/news/2010-02-20/death-appropriate-for-mass-murderers-abbott/337678>
- ABC News (2015) Bali Nine: Myuran Sukumaran and Andrew Chan changed men, say lawyers and family. 24 January. <https://www.abc.net.au/news/2015-01-24/bali-nine-drug-traffickers-sukumaran-chan-changed-men/6024376>
- Australian Federal Police (n.d.) *AFP national guideline on international police-to-police assistance in death penalty situations*. <https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20on%20international%20police-to-police%20assistance%20in%20death%20penalty%20situations.pdf>
- Australian Government (2017) *Australian government response to the Joint Standing Committee on Foreign Affairs, Defence and Trade report: A world without the death penalty: Australia’s Advocacy for the Abolition of the Death Penalty*.
- Banham C and Skehan C (2005) Downer rules out plea to Singapore. *Sydney Morning Herald*, 29 November. <https://www.smh.com.au/world/downer-rules-out-plea-to-singapore-20051129-gdmjhb.html>
- Bennet J (2015) Bali Nine: Andrew Chan and Myuran Sukumaran deserve mercy, Prime Minister Tony Abbott says. *ABC News*, 23 January. <https://www.abc.net.au/news/2015-01-23/bali-nine-death-sentences-abbott-appeals-to-indonesia-for-mercy/6042976>
- Berry P (2011) Gillard against Chan death penalty. *Sydney Morning Herald*, 18 June. Available at <https://www.smh.com.au/national/gillard-against-chan-death-penalty-20110618-1g8r2.html>
- Channel News Asia (2019) Malaysia to keep death penalty, but no longer mandatory. 13 March. <https://www.channelnewsasia.com/asia/malaysia-death-penalty-not-completely-abolished-892706>
- Commonwealth of Australia (2015) *Parliamentary debates: House of Representatives: Motions: Death penalty* (speech). 12 February: 656–662.
- Cooke D (2005) Downer lashes out at lawyer. *The Age*, 3 December. <https://www.theage.com.au/national/downer-lashes-out-at-lawyer-20051203-ge1cti.html>
- Department of Foreign Affairs and Trade (2018) *Australia’s strategy for abolition of the death penalty*.
- Dover B (2015) Hangings of Kevin Barlow and Brian Geoffrey Chambers in Malaysia destroyed families’ lives. *Herald Sun*, 20 February. <https://www.heraldsun.com.au/news/law-order/true-crime-scene/hangings-of-kevin-barlow-and-brian-geoffrey-chambers-in-malaysia-destroyed-families-lives/news-story/cbcd26256052e0d64370bd7ab1f40996>
- Galbally F (1989) *Galbally! The autobiography of Australia’s leading criminal lawyer*. Ringwood: Viking Press.
- Glynn-McDonald R (2021) Coniston Massacre. *Common Ground*. <https://www.commonground.org.au/learn/coniston-massacre>
- Groves D (2019) Feature doc ‘Guilty’ continues the campaign against the death penalty. *If*, February 6. <https://www.if.com.au/feature-doc-guilty-continues-the-campaign-against-the-death-penalty/>

- Guilty*. 2017. [film] Directed by M. Sleeth. Savage Films Pty Ltd
- Hodge B (2005a) *Walk on*. Rowville: The Five Mile Press.
- Hodge B (2005b) Brenda Hodge [interview]. *Enough Rope with Andrew Denton*, 20 June. <https://web.archive.org/web/20111110041849/http://www.abc.net.au/tv/enoughrope/transcripts/s1396696.htm>
- Howard J (2006) Interview with Karl Stefanovic Today Show, Channel Nine. *PM Transcripts*, 6 November. <https://pmtranscripts.pmc.gov.au/release/transcript-22564>
- Human Rights Law Centre (2016) *Parliamentary committee delivers blueprint for Australia's global leadership to abolish the death penalty*. <https://www.hrlc.org.au/news/parliamentary-committee-delivers-blueprint-for-australias-global-leadership-to-abolish-the-death-penalty>
- Kimmerley S (2015) Australian politicians and celebrities have united in pleas for clemency for the Bali Nine duo. *Business Insider*, 5 March. <https://www.businessinsider.com.au/australian-politicians-and-celebrities-have-united-in-pleas-for-clemency-for-the-bali-nine-duo-heres-what-they-said-2015-3>
- Kirby Justice M (2003) The High Court and the death penalty: Looking back, looking forward, looking around. *Australian Law Journal* 77: 811.
- Lennan J and Williams G (2012) The death penalty in Australian law. *Sydney Law Review* 34: 659–694.
- Lindsey T (2015) Indonesia's stance on the death penalty has become incoherent. *The Conversation*, 6 February. <https://theconversation.com/indonesias-stance-on-the-death-penalty-has-become-incoherent-37619>
- Minister for Home Affairs (2020) *Ministerial direction*. <https://www.afp.gov.au/sites/default/files/PDF/MinisterialDirection-2020.pdf>
- News.com.au (2009) Kevin Rudd opposed to death penalty as Bali bombers face execution. 9 September. <https://amp.news.com.au/news/rudd-still-opposes-death-penalty/news-story/cf912223bd13634081e985b77624d12a>
- Norden P (2021) *Seeking justice in the criminal justice system in Australia*. Norden Directions.
- O'Connor B (2015) There will be no winners once these men are dead. *Herald Sun*, 4 March. <https://www.heraldsun.com.au/news/opinion/beverley-oconnor/there-will-be-no-winners-once-these-men-are-dead/news-story/7d71b6c8323cd875718b5f48db0fe90f>
- Parliament of the Commonwealth of Australia and Joint Standing Committee on Foreign Affairs, Defence and Trade (2016) *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty* [report].
- Quilty B (2015) A day with Myuran Sukumaran, a remarkable artist who won't give up in the face of bleak destiny. *Sydney Morning Herald*, 23 January. <https://www.smh.com.au/opinion/a-day-with-myuran-sukumaran-a-remarkable-artist-who-wont-give-up-in-the-face-of-bleak-destiny-20150122-12vu79.html>
- Robertson J (2015) Alan Jones slams Bali nine death sentence as 'barbaric' on Q&A. *Sydney Morning Herald*, 10 February. <https://www.smh.com.au/entertainment/tv-and-radio/alan-jones-slams-bali-nine-death-sentence-as-barbaric-on-qa-20150210-13a6we.html>
- Shelton T and Renaldi L (2018) Malaysian Government's plans to abolish death penalty could save Sydney grandmother's life. *ABC News*, 11 October. <https://www.abc.net.au/news/2018-10-11/malaysia-to-abolish-the-death-penalty/10363948>
- Skehan C (2005) Divisions deepen as Nguyen goes to the gallows. *Sydney Morning Herald*, 3 December. <https://www.smh.com.au/world/divisions-deepen-as-nguyen-goes-to-the-gallows-20051203-gdmkcw.html>
- Smiles S and Forbes M (2007) Australians expect Bali bomber executions, says PM. *Brisbane Times*, October 13. <https://www.brisbanetimes.com.au/national/australians-expect-bali-bomber-executions-says-pm-20071013-ge975j.html>
- Solly R (Pres.) (2003) Howard, Latham would support death penalty for Saddam [radio episode]. *The World Today*, 15 December. <https://www.abc.net.au/worldtoday/content/2003/s1010314.htm>
- Sutherland T (2005) The last time: Nguyen to hold mother's hands. *Australian Financial Review*, 2 December. <https://www.afr.com/politics/the-last-time-nguyen-to-hold-mothers-hands-20051202-jg578>
- Sydney Morning Herald (2003) Howard to the states: Capital punishment your call. 8 August. <https://www.smh.com.au/opinion/howard-to-the-states-capital-punishment-your-call-20030808-gdh8dy.html>
- Sydney Morning Herald (2005a) PM rules out minute's silence. 29 November. <https://www.smh.com.au/national/pm-rules-out-minutes-silence-20051129-gdmj9x.html>
- Sydney Morning Herald (2005b) Bali nine enforcer may be real kingpin'. 26 April. <https://www.smh.com.au/world/bali-nine-enforcer-may-be-real-kingpin-20050426-gdl771.html>
- Sydney Morning Herald (2008) Bali bombers fate up to Indonesia: Smith. 25 March. <https://www.smh.com.au/world/bali-bombers-fate-up-to-indonesia-smith-20080325-21h4.html>
- The Age (2003) PM sparks death debate. 10 August. <https://www.theage.com.au/national/pm-sparks-death-debate-20030810-gdw6oo.html>
- The Australian (2008) Kevin Rudd calls Bali bombers cowards. 2 October. <https://www.theaustralian.com.au/news/bali-bombers-will-get-justice-rudd/news-story/0eda755c5b544892fcff612fcd2a7d2d>
- The Guardian (2015) 'Bali Nine lawyer withdraws bribery claims against Indonesian judges. 12 May. <https://www.theguardian.com/world/2015/may/12/bali-nine-lawyer-withdraws-bribery-claims-against-indonesian-judges>

**Legislation Cited**

*Australian Federal Police Act 1979* (Commonwealth)

*Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Commonwealth)

**Cases Cited**

*Rush v Commissioner of Police* [2006] FCA 12.