

WORLD DAY AGAINST THE DEATH PENALTY.
8 OCTOBER 2010.

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I know I am not the only person here tonight with skin in this game. We are the people whose forebears dined with death by thieving in the early years of the century before last. Thomas Timmins described by the court as “a hardened character” was caught, not for the first time, pinching shoes in a dead end corner of England in 1833. He might have been hanged but instead was sentenced only to transportation for seven years so that I could be standing here in 2010 with a posh accent to argue that no one on earth should ever – for whatever crime – be executed by the state.

One straw we are clutching as Scott Rush, Andrew Chan and Myuran Sukumaran wait to hear if they will live or die is a new mood of mercy and decency sweeping the Indonesian judiciary. In October 2007, the Constitutional Court of Indonesia recommended, in effect, that all death sentences should be commuted to long terms of imprisonment. But the prosecutor in Rush’s case made it clear the other day in Bali that neither the government nor the people of Indonesia share the moral vision of those judges. Calling for the execution of Rush he declared: “We believe that the Indonesian people would consider the death penalty appropriate in this case.”

And so, according to a Morgan Poll taken in August last year, do half the people of Australia. At that point the Bali Nine had been in prison for four and a half years and Rush had been sentenced to death for three. No Australian politicians had – as far as I can tell – been spruiking for their execution. The shock jocks were not screaming for them to be shot. The blogosphere was

not baying for the blood of these foolish young Australians.

On the surface, Australia was showing such wholehearted support for Chan, Sukumaran and Rush that we might be convinced – as the splendid Member for Fremantle Melissa Parke is convinced – that “abhorrence of the death penalty is a fundamental value in Australian society”. Not according to the numbers. Unprompted, unprovoked, without any campaign to egg us on, 50 percent of those Australians polled last year wanted the three to pay for their crimes with their lives.

Tonight I’m mixing celebration with gloom. I want to talk about the state of the debate in this country about capital punishment; about the difference between a debate that has been won and a debate where most of our opponents have fallen silent. I want to talk about a rump cause that still offers a useful constituency to any shady politician who can read an opinion poll. I want to talk about the debate we *are* having on the death penalty, and the debate we aren’t having about the war on drugs.

Australia’s attitudes to capital punishment are inextricably linked to the war on drugs. The same Morgan poll last year that showed half of us wanting to execute Scott Rush and his two companions in crime, showed only 23 percent of us wanting Australia to resume executing murders: 50 percent for drugs and 23 percent for murder. What on earth is going on here?

I admire and I’m moved by those who argue against the death penalty on the pure ground of its savagery. Executions are cold blooded acts of violence that diminish all who live in those states that carry them out. But I do not believe a stake will be fixed through the

corpse of capital punishment until we see that the lingering affection we have for executions is mixed up with the criminalisation of the drug trade and the absurdly harsh penalties we, too, impose on smugglers, dealers and consumers of illicit drugs.

We don't execute, thank God, but a disturbing number of us are happy to see Singapore, Malaysia, Vietnam and Indonesia do so on our behalf: us and them, warriors together in the hopeless, lost war on drugs. Trying to understand why those societies are so keen to kill is vital to addressing the curse of capital punishment in Asia. But we do our neighbours a disservice and we are less than true to ourselves, if we do not recognise how much we have in common here: not the methods, but the aims – to stamp out the drug trade by a regime of exceptionally harsh punishment.

Of the 49 registered parties that contested the 2010 elections only one as far as I can see had capital punishment in its platform. Not Family First or the Shooters Party but One Nation. Was death to be the punishment for murder, for terrorist atrocities, for rape? No. For drugs. One National in power would hold “a binding referendum on mandatory capital punishment for manufacturers & traffickers of hard drugs.”

One Nation got nowhere. Even better: their capital punishment policy was ignored by the press throughout the campaign. Part of the good news we celebrate tonight is that capital punishment was not an issue in the 2010 election. But it was in the 2007 election and may well be again in 2013. It's an issue that doesn't go away. Though the polls over 60 years show Australia has gone from being a country that took execution for granted to one that's strongly hostile to capital

punishment. They show how volatile the national mood can be in response to panics, threats, drug epidemics and slaughter. They don't show an issue on its way to extinction.

In the middle of August as Rush was about to appeal his death sentence in Bali, fresh soundings were taken of the national mood. A year after that alarming Morgan poll, Nielsen found support had swung more strongly in favour of the condemned. A great deal of the credit for this goes to the campaign waged by Lee and Christine Rush on behalf of their son. Also to the work of Aussies Against Capital Punishment, Australian Lawyers for Human Rights and Amnesty International. Even so, Nielsen found 28 percent of us still want Rush and his two colleagues shot. That rises to 33 percent in Queensland and 38 percent in WA.

Nielsen polls are big, modest and careful. Fourteen hundred people were quizzed on the phone and their responses broken down by sex, age, state, address and political affiliation. I love these figures. They let us stare Australia in the face. It's not always a pretty sight. But they show us what we are and how wide of the mark our preconceptions can be.

If you guessed men were more enthusiastic than women, you would be right: 36 percent of the men polled but only 21 percent of women said shoot them.

If you guessed the bush would be much keener than city folks, you would be wrong. There is a difference, but it's negligible.

If you guessed that capital punishment was a cause especially dear to Coalition voters, you would be dead wrong. Supporters are as likely to vote Labor as Coalition: 28 percent of Labor and 30 percent of Coalition voters want the Bali three to die. Go further

out on the political fringe and support climbs steeply: 38 percent of Family First and 41 percent of those supporting “independents” want the Indonesians to carry out the death sentences.

And if you guessed capital punishment is a particular enthusiasm of the old, you would be wrong again. Australians between the ages of 25 and 54 are far keener than those older and younger for the Indonesians to go through with it.

In my mind’s eye, the identikit supporter of capital punishment in 2010 is a 52-year old, Family First voter living in Geraldton, W.A. But he is far from alone. Nielsen’s figures suggest that as we meet tonight to celebrate 40 or 50 years of campaigning against capital punishment, something like 4,000,000 Australian voters still want Rush, Chan and Sukumaran punished by death for trying to export 8.3 kilos of heroin from Bali.

I’m a bit of a Pollyanna by nature. I look on the bright side. But on one or two issues I’m frankly a bit gloomy. The death penalty is one of them. Australia’s record isn’t appalling. We slaughtered prisoners in our first century but the last to die was in 1967. Execution has been off the statute books for 25 years. The last serious campaign to revive capital punishment – by Tony Windsor in New South Wales – failed over 15 years ago. None of the big parties want to touch it now. It’s almost taboo. But remember: this is Australia. There is a lot of ugly stuff down there waiting to be pumped up.

In the first year of his government Gough Whitlam realised an old political ambition: he put through parliament a bill abolishing the death penalty for all Commonwealth offenses. Queensland had done so long ago in 1922. NSW had done so for most offences in 1955 but not, God love the burghers of Macquarie St,

for treason and piracy. *Treason against NSW!* Tasmania had abolished execution in 1968. Whitlam was not a pioneer but had an honourable place in the queue.

There was a conscience vote. The National Party and chunks of the Liberal Party fought and lost rearguard actions to retain the death penalty for murders of police, murders committed during hijackings and murders by terrorists. The bill that passed in September 1973 was a clean, across the board abolition. The vote was 73 for the bill and 27 against. Among the “noes” was Ian Sinclair, Billy Wentworth and Malcolm Fraser.

By 1984, capital punishment was abolished across Australia. It would be natural to think that support for the death penalty at this point entered a long and steady decline. Wrong. Instead of falling, it rose. Abolition made Australian hearts grow fonder. In the ten years that followed, support for executing murderers rose from 43 percent to 53 percent. As John Howard came to power in the mid-1990s, Australia had much the same attitude to executions held back in the dark ages when Henry Bolte hung Ronald Ryan.

The last execution in Australia earned Bolte the contempt of the churches, the law, the universities and the *Melbourne Age* but won him six fresh seats in the elections of 1967. Twenty years later, he was still confident that capital punishment was a winner. Jeff Kennett said:

I remember coming back from a game of golf in 1986 and hearing on the car radio that Barlow and Chambers had been hanged in Malaysia. It affected me. I was alone. Suddenly I found my hands shaking. I had to pull over. I thought that if I ever became Premier I'd have to sign death warrants. And I knew I wouldn't do it, because

there's always the possibility you could be hanging an innocent person.

I used to go down to Henry Bolte's farm for a few scotches at Christmas. Before the 1988 election, Henry said to me: 'Reintroduce capital punishment and you'll be over the line.' I said: 'I understand what you're saying, but I'm not going to do it.'

On Barlow and Chambers, Kennett was not with the majority. Their execution revealed for the first time Australia's enthusiasm for having someone up there in Malaysia or Singapore execute drug smugglers caught heading our way. While 44 percent of Australians wanted hanging brought back for murder in 1986, 80 percent of us were happy to see the Malaysians top Barlow and Chambers.

Here, as in every corner of politics, John Howard showed how the dark side might be manipulated. According to his wife, he was a fierce opponent of capital punishment. She supported the death penalty "under certain circumstances", she told the *Sydney Morning Herald* but her husband "has a lawyer's absolute ... conviction against it." That was in June 2001. In September the twin towers came down. In October the following year, Howard was walking through the wreckage of the Sari nightclub. The yet to be identified perpetrators had to be prosecuted, he said. "I'm not quite sure what Indonesian law provides for. But let me put it this way: I don't think Australia will want much mercy being shown to them."

He was right. The slaughter of so many – and so many of them Australians – tested the resolve of even committed opponent of capital punishment. Newspann would show 57 percent of us in August 2003 supported

Amrozi's execution and almost exactly the same number called for the death penalty to be brought back in Australia to punish acts of terrorism. Principled opposition to capital punishment was reduced to 36 percent. The leader of the Democrats Andrew Bartlett called Amrozi's execution a "barbaric act" but Simon Crean the Labor leader backed John Howard's decision not to intervene in the matter.

That year Howard "suggested state Liberal Opposition parties could raise the reintroduction of the death penalty as an election issue," reported Cynthia Banham in the *Sydney Morning Herald*. It goes to a certain breadth in the man, that Howard could always see the electoral advantage of issues he claimed, personally, to despise – racism for instance, and capital punishment. He was a superb technical politician. Or, to put it another way: he never missed a trick.

Behind the scenes, the AFP was assisting Indonesian police without guarantees that executions would never result from their work. Under Howard they would also work in Malaysia and Tonga without such guarantees. This was despite Australia having acceded in 1990 to the Second Optional Protocol of the International Covenant on Civil and Political Rights. We had pledged never to re-introduce capital punishment in our own country and not to expose anyone of any nationality to the real risk of execution anywhere. Police co-operation of this kind was clearly contrary to the declaration this country had made over a decade earlier.

So in April 2005, the AFP gave information to their counterparts in Indonesia that led to the arrest of the Bali Nine. There is no need tonight to go back through all of that except to say that Australia found itself deeply compromised when calling for clemency

towards the nine, and for clemency – later in the same year – when 24-year old Nguyen Tuong Van found himself on death row in Singapore. Don't imagine, by the way, that the nation was united in its wish to see Nguyen live. It wasn't like that. The government tried harder as the end approached thanks to demands from, among others, the local activists of Amnesty International. But as far as 61 percent of Australians were concerned, Nguyen had been condemned to death for drug trafficking 400 grams of heroin and the sentence should be carried out.

Capital punishment is not an issue where support and opposition over the years can be shown by a simple line across a graph. Under Howard, most of us were happy to see terrorists and Australian drug smugglers executed up north by proxy. Most Australians also wanted the death penalty brought back to punish acts of terrorism at home. But at the same time, the renewed national enthusiasm for hanging run-of-the-mill murderers faded dramatically. According to the long-established *Trends in Australian Political Opinion*, support for restoring the death penalty for murder fell from 66 percent when Howard became prime minister to 44 percent in the 2007 election that brought him undone.

Labor, at least in theory, opposed capital punishment absolutely. Though Robert McClelland chose a bad time – a couple of days before the fifth anniversary of the Bali bombing and couple of months before polling day – he was doing no more than restating Labor policy when he lashed John Howard's inconsistencies on capital punishment. The then shadow foreign minister pledged that Labor in government would:

strongly and clearly state its opposition to the death penalty, whenever and wherever it arises and will use its position internationally and in the region to advocate for the universal abolition of the death penalty.

The government seized the opening. “I think it was a very strange time for the Labor Party to come out in support of the Bali bombers,” said Peter Costello. Alexander Downer declared he would never “use the resources of the Australian diplomatic service to plead for the lives of these kinds of people who commit these kinds of atrocities.”

Rudd fell on McClelland like a ton of bricks; ordered all Labor candidates in the election henceforth to clear all media comments on all subjects with his office; and unilaterally trimmed Labor’s commitment to oppose capital punishment on all fronts. In any head on collision between Rudd the moralist and Rudd the populist, it wasn’t always the moralist who came off best. He announced his government would “not be making interventions diplomatically in support of any terrorists anywhere, anytime.”

In power, Labor came to this rough compromise: abroad it would seek clemency for Australians facing death in Asian jails but would not campaign against capital punishment in this corner of the world. At home it would take a step long urged on the party by putting into law the commitment we had made by signing up to the Second Optional Protocol. The Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill introduced late last year and passed early this meant that no state government can ever again – at least while the Commonwealth holds its nerve – bring back the noose.

At first glance, this looks like an absolute triumph over the rump forces that still hanker for execution in Australia. No one in Parliament spoke against the bill. No one voted against the bill. It passed on the voices. Surely when Quentin Brice signed it into law the forces of darkness were routed? Maybe so, but let this gloomy Pollyanna make a few cautionary remarks.

The enthusiasts for the death penalty were keeping their heads down. No one from the National party - which led resistance to the 1973 legislation - spoke in the 2010 debate. The brand new Leader of the Opposition Tony Abbott spoke outside the parliament in the days leading up to the debate and made it perfectly clear he does not support the fundamental principle of the legislation: the absolute renunciation of capital punishment.

Abbott revealed himself to be more enthusiastic for the death penalty than any leader of the Coalition since Malcolm Fraser voted against Gough Whitlam's bill all those years ago.

"I have always been against the death penalty," Mr Abbott said. "I sometimes find myself thinking, though, that there are some crimes so horrific that maybe that's the only way to adequately convey the horror of what's been done ... Well, you know, what would you do with someone who cold-bloodedly brought about the deaths of hundreds or thousands of innocent people? I mean, you've got to ask yourself, what punishment would fit that crime? That's when you do start to think that maybe the only appropriate punishment is death."

Also keeping his counsel during the debate was Tony Windsor. This week he confirmed to me that his position on capital punishment hasn't changed since

the mid-1990s when he brought a 400,000 signature petition to the NSW parliament calling for the restoration of the death penalty for murder. He says now he was responding them to a strong push in his electorate of Tamworth following several terrible murders, including that of the little girl Ebony Simpson. Then and now, Windsor says executions should only be carried out when there is no doubt of guilt – not guilty beyond reasonable doubt, but a new category not known to the law of guilty beyond any doubt whatever. Capital punishment is not on his agenda now but he says: “Under certain circumstances, I wouldn’t lose a lot of sleep if someone didn’t wake up again.”

So while the polls show Australians have probably never been less enthusiastic about executing murderers, it would be imprudent to forget that the Leader of the Opposition, the kingmaker of the national government and about a quarter of the population are still unhappy about the official stance of absolute abolition. So why aren’t politicians exploiting that disquiet? Why aren’t the shock jocks howling for executions here as they are in the United States? Where is the Bushell’s Tea Party?

Against doctors’ advice I spent some time roaming around the blogosphere and in particular the blogs of my fellow Insiders’ couch sitter Andrew Bolt. Two or three weeks ago he invited comments on the sentence given to an Ian McConkey who earlier this year – and for no apparent reason – beat to death a Buddhist monk meditating early one morning in a park in Perth. McConkey, Bolt told his readers, would be eligible for parole after three years and four months.

The bloggers were in furious agreement that the sentence was too short. For this they heaped abuse on politicians, judges, lawyers, do-gooders, intellectuals,

television commentators, newsmen and “leftist maggots”. There were vigilante calls: “My preferred ammo would be the 0.22 Magnum Winchester Hollow Point,” wrote Morry of Moriac, signing himself with a little yellow smiley face. But very few of the dozens of bloggers who bought into the McConkey controversy called for the return of the death penalty. Instead they wanted longer and perhaps mandatory jail sentences.

From the gutters of public debate comes this sign that the ban on executions in Australia is secure. The millions who want to restore the noose have no voice. Shock jocks aren’t crusading and respectable politicians – at least for now - are treating the issue as taboo. Three little initials appear to explain why: DNA.

Nearly 20 years ago in the United States, the Law School of the Yeshiva University in New York established the first Innocence Project using DNA to review convictions on and off death row. Within ten years, according to the American Civil Liberties Union, 108 people including 12 death row inmates had been exonerated. That process continues and the result has been to mire the pro-capital punishment forces – here and there - in doubt.

Greg Smith is a law and order man but as a former deputy Director of Public Prosecutions and now the shadow attorney general of NSW, he has put a brake on the madder impulses of the Liberal Party in my home state to flog, fine and jail just about anything that moves. Smith acknowledges the residual support for capital punishment but believes politicians aren’t beating that drum because of fears that innocent people have been executed in the past and may be again in the future. “Politicians are concerned,” he said, “about the fallibility of police, juries and courts. They might make a mistake. It happens.”

Australia isn't going to hang anyone soon. I would never say the door is closed to execution, but the obstacles to its restoration are formidable. The states have been barred; the proponents of hanging are leaderless; and the last Morgan poll on the subject showed them outnumbered three to one by citizens who oppose the return of capital punishment in Australia. Who knows what impact a single terrorist outrage on home soil would have on the politics of the death penalty in Canberra. For now there is no reasonable prospect of Ronald Ryan losing his place in the history books.

But that does not help Scott Rush, Andrew Chan and Myuran Sukumaran. Nor will it help Michael Sacatides photographed last week by Bali police as he sat impassively in handcuffs while 1.7kg of methamphetamine was weighed in front of him.

You have to hand it to them up there: the practice of filming the apprehended being stripped of their drugs goes a long way to settle doubts about their guilt. Footage of the Bali Nine unwinding the bandages that held the heroin is shown virtually every time Rush's case is reported. To the arrest, the trial and the appeal these grainy images brought an irresistible message of guilt. Sacatides doesn't help himself with the fatuous claim that the tonnage of shabu shabu found in the lining of his bag was left there by an Indian tea seller in Bangkok.

Last December, the government issued guidelines supposed to clarify the terms on which our police will continue to lend a hand in countries where the death penalty still applies. For about five minutes, the guidelines seemed a big step forward until a spokesman for the Attorney General Robert McClelland declined to confirm that the new rules would have led to a different

outcome in the case of the Bali nine. “That,” he said, “is hypothetical.”

Australia is not afraid to tell regimes to our north what we think about the death penalty – though how enthusiastically the Rudd and Gillard governments have represented us on that point is open to doubt - but if lives are to be saved it’s time we also found the courage to tell them we don’t share their panic about drugs.

In future, before the AFP assists operations in Indonesia or Singapore or Malaysia, a high ranking officer of the force must consider a number of factors including “the seriousness of the crime” in question. This week I asked Brendan O’Connor the minister responsible for the AFP if the government thinks drug running is a crime so serious it merits execution. He won’t say no. “The Australian Government does not condone criminal activity and continues to warn Australians who may be involved in criminal activity overseas that they may be subject to the death penalty.”

That brutal verdict is way out of line with Australian values except, perhaps, those of the leadership and shattered ranks of One Nation. But taking drug running off the AFP’s list would, a government source explained, anger the Indonesians. Their judges are having second thoughts about capital punishment, but the people of Indonesia see drugs as one of the most serious offences, on a par with murder. That argument Australia has accepted is that if we want to maintain cooperation with Indonesia on terrorism and people smuggling, we have to see eye to eye with them on drugs.

Saving the lives of our arrested nationals is one of a number of sound reasons for Australia to come to grips with the futility of the war on drugs. Even if we lack the

courage to face decriminalisation – and the world is moving fast on this - it's time we addressed the severity of anti-drug laws in Australia and made it absolutely clear to our near neighbours that we don't condone their even more savage punishments for drug running: not immensely long jail terms and not death.

Tonight let's celebrate how far we have come without being blind to the fragility of the consensus confirmed in Canberra this year that Australia should never again employ a hangman. Let's also face the obvious: on death row in countries all around us are men and women whose crime was to be caught up in the drug trade. Three of our own are already among them. Michael Sacatides is about to join their number. The next step in fighting capital punishment in our region and our world is to recognise how intimately the drug trade and the death penalty are entwined. Bringing sanity to both will save lives.

D.E.M.