22nd Lionel Murphy Memorial Lecture by Cameron Murphy

Australia as International Citizen - From Past Failure to Future Distinction

Tuesday 11 November 2008

In his short time as Attorney General, and later as a Justice of the High Court of Australia, Lionel Murphy was able to quickly reform the law to bring Australia into step with the international community on such issues as Consumer Protection, through the Trade Practices Act and a sensible approach to the breakdown of marriage with the Family Law Act. But he was also a visionary in the sense that he foresaw areas of law reform in which Australia could, and should, lead the world.

His litigation on environmental issues such as the case to prevent French Atmospheric Nuclear testing and later, his Judgment in the Tasmanian Dams Case, demonstrates his recognition of the environment as an issue of global importance and a matter of urgency. 20 years before it became mainstream and well before the current global crisis over carbon emissions.

Sadly, we have seen little innovation since, and in many ways have witnessed Australia slip far behind the rest of the world, particularly in the policy areas of human rights and the environment.

The rest of the western world has for many years had charters or bills of rights to protect the individual against the state, stringent laws protecting personal privacy, and has also moved to eliminate many forms of discrimination, particularly against people in same sex relationships. While other nations are contemplating how best to extend these protections Australia is still debating whether or not we should have them at all.

Although the Howard government was focused on international engagement of a kind – the war in Iraq, economic and security cooperation – its tenure also marked the most significant period of disengagement between Australia and the international community on human rights dialogue since the Second World War.

The focus was clearly about personal relationships - Howard/Bush, Howard/Blair and so on. The world has now changed, with the election of Obama, and others, who recognise the importance of multilateral approaches to problem solving on the international stage and who prefer to start with dialogue rather than bravado.

Soon after his election as Prime Minister, Kevin Rudd signaled that he was determined to change the former Australian position and to re-engage with the international community.

There was, from an announcement by the Prime Minister on 30 March 2008, and still is talk about, Australia seeking a position on the United Nations Security Council, the body capable of issuing resolutions binding on members of the international community.

But before we can consider ourselves worthy of elevation to such a pertinent position within the international community, we must first deal with our own unfinished business as an international citizen. While we have taken a number of important positive steps during the past year, such as signing the Kyoto Protocol, there are certain elementary matters that we need to resolve before we can consider ourselves well-placed to confront the deep troubles facing the international community.

Tonight I will focus on two important multilateral treaties. The first is the Second Optional Protocol to the International Covenant of Civil and Political Rights (ICCPR), which would implement the permanent abolition of the death penalty in Australia across all states. The second is the Convention against Torture (CAT), which imposes an absolute, non-deregable prohibition against the use of torture in any circumstance.

I will discuss the simplicity by which these instruments can be implemented and the significant arguments raised to defeat their full implementation under Australian law. I will demonstrate, in analysis of our conduct as a Nation, the urgent necessity in full implementation of these treaties in order to achieve distinction as an international citizen allowing us to play the role we aspire to on the international stage.

The research and the submissions by the New South Wales Council for Civil Liberties (NSWCCL), on both of these issues, is from the outstanding work of many people including particularly Leah Friedman, Kevin O'Rourke and Michael Walton, who is incidentally a current Lionel Murphy Scholar studying this subject in Canada.

The execution of the Bali Bombers, only 48 hours ago, has made the death penalty a topical issue in Australia once again. It is my firm view that there is no place for the death penalty as a punishment, anywhere in the world, against any person for any crime – no matter how serious or abhorrent. This is also the position of the New South Wales Council for Civil Liberties and until a few years ago was the firm position of the Australian Government.

While advocates of the death penalty will argue that it is necessary as it is the only punishment which befits the most serious of crime, and commonly that it brings 'closure' for the victims there are countless arguments against its use.

As we can already see from the execution of the Bali Bombers it has a tendency to create martyrs, sends the wrong message in that it sanctions killing by the state and in doing so undermines the seriousness of Homicide

as a crime. Victims of the bombing expecting 'closure' have already expressed the view that they remain deeply affected by their experiences.

Justice is not and should never be about 'an eye for an eye'. It is about society as a whole determining an appropriate punishment on behalf of the entire community, not simply those directly affected by the crime. Capital punishment throughout history and even now is often disproportionate as a punishment for the crime.

I listened over the past two days to media personalities suggesting a cultural argument supporting the death penalty, an argument not dissimilar to that used by our national leaders in recent times. In essence it is that we should not impose our cultural values (that being opposition to the death penalty) upon another sovereign state.

The other state (Indonesia for example) should be free from cultural interference and free to legislate as it desires. Capital punishment is not a cultural difference. It is universal – either you believe in the preservation of human life or you do not. It is not a right that applies to some human beings but not others simply because of their race, where they happen to live or what crime they have committed.

I doubt that those who hold this view (that sovereign states can do as they please in relation to capital punishment) would leap to the defence of the Government of Somalia who allowed 13 year old Aisha Ibrahim Duhulow to be stoned to death in a stadium packed with 1,000 spectators in the southern port city of Kismayo[1].

She was sentenced to death for adultery as she 'allowed herself' to be raped by a stranger. I say to the protagonists – what is the difference? According to your argument, both the Bali Bombers and Aisha were sentenced according to law in sovereign States. But I am yet to hear from any commentator who supports the actions in the latter case.

The reason for this is that any basic examination of that argument demonstrates that it is never acceptable to kill another human being and never acceptable to allow sovereign states to conduct themselves, in relation to their own criminal law, in a manner which is vastly out of step with the international community. The death penalty *is* out of step with the international community and we have an obligation as a nation to oppose it universally.

Even Prime Minister Howard was once on the record as an opponent of the death penalty, for yet another reason. In a doorstop interview in 2001 the then Australian Prime Minister said that he had,

[1] Boston Herald, *Teen girl stoned to death in Somalia*, 2 November 2008 at http://www.bostonherald.com/news/international/africa/view.bg?articleid=1129435

> "a pragmatic opposition to the death penalty that is based on the belief that from time to time the law makes mistakes and you can't bring somebody back after you've executed them".[2]

In order to understand the context of the importance of the Second Optional Protocol of the ICCPR it is necessary to examine the recent history of this issue in Australia.

Lionel Murphy, as Attorney General, was responsible for the introduction of the *Death Penalty Abolition Act 1973* (Cth) which ensured that the Commonwealth of Australia could no longer apply the death penalty as punishment for any crime. However, it was not until 1985 that the death penalty was finally abolished amongst all Australian States when it was removed as a punishment for treason and piracy in NSW.

Australia signed the Second Optional Protocol to the ICCPR, which makes it a fundamental human right not to be executed. It prohibits the execution of anyone under the law of a ratifying country. The protocol also implicitly prohibits the reintroduction of the death penalty.

The *Second Optional Protocol* entered into force in international law on 11 July 1991. It has currently been ratified by 66 nations**,** and signed by a further 35 nations. 'Signing' a treaty is the primary step in ratifying it, but does not bind the signatory country. Australia both signed and ratified the protocol on 2 October 1990.

Given these positive measures, one may question the necessity to campaign on this issue but it is my belief that Australia is, in effect, collaborating in the increased use of capital punishment in our region and perhaps is in grave danger of reverting to its use in Australia.

Without legislative force to give effect to the protocol it is still possible for the Australian States to reintroduce the Death Penalty. No law has yet been enacted which would bind them to the obligations of the Commonwealth in signing and ratifying the Protocol.

Each Australian State is free to reintroduce the death penalty, for any crime, if it chooses. I am concerned that reintroduction may be contemplated by the States, particularly in relation to terrorism offences, and especially if we should face a terrorist event in Australia.

Support for the death penalty in Australia is strong but has been steadily reducing over time. The *Australian Social Science Data Archive*, which is the only reliable regular poll to assess public opinion over the Death Penalty records the following in its Australian Election Survey 2004;

Support for the death penalty stands at 51.1%, with opposition at 32.7% (16.2% undecided). This is a 5.5% decrease in support from the last AES

[2] Prime Minister Howard in a doorstop interview on 13 June 2001. (sorry, link removed)

(2001) and an almost 6% increase in opposition to the death penalty over the 2001 figures. The trend is that support has been falling for the past twenty years.

Many people in the community are concerned about crime and even though generally crime is at record low levels they perceive that it is more serious than ever before.

The natural reaction of most ordinary Australians is that the Death Penalty is a good deterrent to crime and should be supported. Almost anyone you speak to who has been the immediate victim of a robbery believes that nothing short of the death penalty is an appropriate punishment.

While I empathise with their distress and understand their reaction I am thankful that we have a criminal law process which is removed from the individual and which can usually bring a measured and proportionate approach to finding an appropriate sentence.

Despite the large public support for it, it is the policy of every major political party in Australia is to oppose the death Penalty under all circumstances, and this has been policy for decades. The Australian Labor Party Policy states:

Chapter 14, Paragraph 97.

> "Labor opposes the death penalty and believes that death by hanging, beheading, electrocution, firing squad, or stoning is inhumane, no matter what the crime. Labor in government will 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".[3]

The policy of total opposition to the death penalty was reaffirmed by the Liberal Party Shadow Attorney General Senator George Brandis, who said as recently as 31 October 2007,

> "The Coalition today reinforces Australia's approach [of opposition] to capital punishment, noting that it has been and continues to be a bipartisan policy that the Coalition maintains."[4]

Despite the unequivocal clarity of the policies, the recent rhetoric from our leaders has been entirely different. On 16 February 2003 then Prime Minster Howard said in a television interview on Sunday morning that the Bali bombers,

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[3] Australian Labor Party, *National Platform and Constitution 2007* Chapter 14 at page 240

[4] Senator George Brandis, *Death penalty: consistency of the Coalition's position,* Media Release, 31 October 2008.

> "should be dealt with in accordance with Indonesian law. …and if [the death penalty] is what the law of Indonesia provides, well, that is how things should proceed. There won't be any protest from Australia".[5]

In early March 2003 Howard, during an interview with a United States television network said that he would welcome the death penalty for Osama Bin Laden,"I think everybody would".[6]

In an attempted act of clarification, then Foreign Minister Downer said Australia would not intervene if Bin Laden were to be executed.

> "I personally have never supported the death penalty but in the case of Osama bin Laden, I don't think that too many tears would be shed if he was executed, bearing in mind all the people he's responsible for killing." [7]

Then Labor Leader, Mark Latham, said in relation to the Bali Bombers that,

> "[He] wouldn't be losing any sleep over the decision to hand down the death penalty" [8]

These comments marked a significant change in Australia's attitude to the death penalty and a further weakening of Australia's commitment to international human rights standards. Unfortunately, this weakening of policy has not changed with the election of the Rudd Labor government. In a statement of Prime Minister Rudd in relation to the execution of the Bali Bombers he said:

> "When any individual is convicted with the death penalty anywhere in the world, we, the Australian Government, only intervene in the case of Australian citizens.'

Contrast that statement with Labor policy, which as I outlined before, stipulates that,

> "Labor in government will 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".[9]

The problem, which emerged, is that instead of universal opposition to the Death Penalty, both the Australian Government and Opposition policy on this

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[5], "Interview with John Howard (Part 2)", ATV Channel 7, *Sunday Sunrise*, 16 February 2003.
[6] "John Howard, Australian Prime Minister"**,** FoxNews, *Your World with Neil Cavuto*, 6 March 2003.
[7] Minister for Foreign Affairs, Alexander Downer, "Nigerian Death Sentence is Inhumane", Media Release FA114, 22 August 2002.
[8] ABC Local Radio, Melbourne, *Interview with Barrie Cassidy*, 8 august 2003
[9] Australian Labor Party, *National Platform and Constitution 2007* Chapter 14 at page 240

issue has devolved to a qualified medium. It is now opposition to the Death Penalty in Australia, or only in relation to Australian Citizens overseas.

The effect of this is that it is now extremely difficult to advocate for clemency for the 9 Australians in China, Vietnam and Indonesia who have been sentenced to death, or the many thousands of other human beings who also face death in those nations.

The current problem began in the late 1990s when the Howard government decided that Australia could assist in foreign death penalty cases without a guarantee that no one would be executed. This clearly violates Australia's obligations under the ICCPR and was a significant break with past practice.

Through a series of documents obtained under Freedom of information, we have discovered that the Howard government made a conscious decision to 'revise' Australia's universal and consistent opposition to capital punishment 'in light of the government's strong stance on terrorist offences'.[10]

The government had flawed legal advice stating that Australia's human rights obligations do not extend beyond our borders or beyond individuals in the custody of Australian agents overseas. Following the government's legal advice to its logical conclusion, it authorises Australian Federal Police and ASIO officers to assist their foreign counterparts in violating human rights – so long as they do it abroad and their counterparts are the ones detaining the victims.

In essence there is a green light for our authorities to share information, as appears to have happened in the case of the Bali Nine, which will lead to Australians being convicted of capital offences in other jurisdictions.

In response to the deterioration in Australia's once strong stance on this issue the NSWCCL in 2004 formed a Cross Parliamentary working Party Against the death penalty.

It brings together members of all political parties in the Commonwealth Parliament in order to work towards legislatively binding the States to prevent them from reintroducing the death penalty and towards eliminating it in our region. It also allows people to express their opposition to capital punishment as a group and in a bi-partisan way.

The first step of the Rudd government should be to correct the Howard Legacy. It would achieve significant international respect if it were to implement the Second Optional Protocol into Australian Law, to ensure that Australian agencies cannot share information which assists the prosecution of Australians or others for capital offences and we, as a nation, return to a position of universal opposition to the death penalty.

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[10] See **www.nswccl.org.au/docs/pdf/dpfoi guide.pdf** for an analysis and **http://www.nswccl.org.au/docs/pdf/dpfoi.pdf** for a copy of the documents released under FOI. (sorry, link may be removed)

Adoption of the Second Optional protocol will place the issue of the death penalty beyond debate in Australia.

It will allow us to argue with more authority for the abolition of the death penalty in our region and allow us to advocate against the death penalty for Australians and others in our region that are on death row.

There is nothing wrong with trying to convince our neighbours of the error of retention of the death penalty as a signatory to the Protocol it is our obligation to do so.

It will also reduce, and perhaps eliminate the transfer of intelligence leading to conviction of capital offences in exchange for terrorism intelligence.

While Foreign Minister, Stephen Smith, announced yesterday that Australia would co-sponsor a United Nations Resolution for a moratorium on the death penalty it is difficult to see that it will be well received. He may be unaware that just such a resolution was passed by the UN general Assembly on 18 December 2007 by 104 votes in favour to 54 votes against (with 29 abstentions).

While I welcome any positive action, we can hardly advocate for the international abolition of the death penalty effectively when a back door to its reintroduction in Australia remains open, our own position on the issue is weak and one of self concern and we propose actions (such as a moratorium motion) that have already been recently achieved.

I now turn to the Convention Against Torture (CAT). The convention has limited application in Australian law and must urgently be fully endorsed.

It is important to outline the history of the convention and its rational in order to understand its necessity. After the trauma of the Second World War, the international community took the unusual step of placing the legitimacy of physical and mental torture outside public debate with the introduction of the Convention Against Torture.

The prohibition against torture achieved a very rare status under international law – as a fundamental norm from which no derogation is permitted. I've lived all my life in this period, believing that we'd finally put to rest any possible suggestion that torture could serve a legitimate purpose in any society. But the past seven years have demonstrated how fragile international consensus can be.

Of course, prohibitions against the violation of fundamental rights work well during peacetime and in the absence of terrorism. It's when nations come under threat that the mettle of liberal democracy is tested. What makes us a relatively unique society – in the world today and historically – is that we are entitled to talk about everything.

The dominant urge militates against this idea that certain matters should be placed beyond the reach of public discussion and popular demands. Free speech makes our society strong, but it also makes our liberal democracy fragile.

As a descriptive matter, I tend to agree with Raymond Gaita, that societies are defined by what they will and won't talk about. We have become a different society over the past seven years because it has become acceptable to talk about the legitimacy of torture for the first time since the Second World War.

When we started to talk about it, we realized how weak the normative foundations of the absolute prohibition were, and how little practice we'd had arguing against the repeal of the absolute prohibition.

I think that it was because we'd had so little practice that opponents of the absolute prohibition gained so much ground with so little ammunition – attempting to distinguish certain degrading practices from torture per se; drawing lines between mental and physical torture, between so-called "*de minimus*" physical discomfort as oppose to "real" torture. I believe that advocates against torture lost a lot of ground, and it won't be easy ground to regain in its entirety.

One of the salient contemporary challenges for those of us who care about the Convention is to try to understand the relationship between the liberal democracy that exists within our borders and what goes on outside. What obligations does this country have to prevent torture outside its physical territory? Is the best way to think about these sorts of problems in terms of physical territory?

Or should we really be thinking about an obligation to protect Australian citizens – like Habib and Hicks? How does the Convention bear on decisions that are made in the asylum context?

There are three recent events that demonstrate why we need a strong Convention Against Torture now more than ever before.

The recent case of an Afghan asylum seeker rejected by Australia under the Howard government clearly demonstrates why it is necessary to treat the convention with urgency. As reported in the Sydney Morning Herald on 31 October 2008,

> "The man, Mohammed Hussain, was thrown down a well by gunmen, believed to be the Taliban. Then in front of onlookers including members of his family, the killers threw a hand grenade down the well and he was decapitated."[11]

[11] "Beheaded after trying for asylum in Australia", *Sydney Morning Herald*, 31 October 2008 at **http://www.smh.com.au/news/national/beheaded-after-trying-for-asylum-in-australia/2008/10/31/1224956332591.html**

In its original form the CAT was designed to prohibit torture within a solitary state. This was done to ensure that the atrocities witnessed during the Second World War would never be repeated and brings me to the second example.

The High Risk Management Unit of the Goulburn Gaol, otherwise know as 'Supermax' it touted by the NSW Government as an example of how tough we are on terrorists. Prisoners are kept in cells that measure 2 by 3 metres for 22 hours or more a day. Cells in the Supermax are in many cases smaller than those that have been derided in Guantanamo Bay.
When an inmate enters the HRMU they are kept in segregation for as long as two weeks. This is having a significant impact on the mental health of inmates.

Article 16 of the Convention against Torture prohibits cruel, inhuman or degrading treatment or punishment. Two years ago the Human Rights and Equal Opportunity Commission (HREOC) said that the conditions in which mentally ill inmates are kept in NSW prisons violates the prohibition on cruel, inhuman or degrading treatment or punishment.

Despite evidence of mental illness resulting from incarceration both prison authorities and the NSW government believe that the conditions at *Supermax* are not in breach of the convention. They proudly cite the physical discomfort experienced by prisoners, many of whom are being held on remand, as an achievement rather than a concern and they rely on the degree of mistreatment to distinguish it from torture. It is reminiscent of former Attorney General Philip Ruddock's statement when he said,

> "I don't regard sleep deprivation as torture."[12]

There is no rational purpose in the mistreatment of prisoners – it is cruel and inhumane and reflects poorly on society as a whole.

Thirdly we must confront the issue of refoulement or in other words the removal of people from one jurisdiction to another where torture occurs. While this is commonly a problem in the arena of asylum seekers we have direct involvement in the matter of rendition through the allegations made by Guantanamo Bay prisoner Mamdouh Habib which are outlined in our shadow report on the CAT[13].

Habib was detained in Pakistan, where he was subjected to torture and ill-treatment. When Habib was interviewed by Australian officials in Pakistan he complained about this abuse. Australian law enforcement and security officers decided not to investigate the complaints.

Habib was extraordinarily rendered by US officials to Egypt, where he was

[12] "Australia to sign torture treaty that Howard spurned", Sydney Morning Herald, 1 March 2008 at **http://www.smh.com.au/news/national/australia-to-sign-torture-treaty/2008/02/29/1204226991242.html**
[13] **http://www.nswccl.org.au/docs/pdf/CAT%20shadow%20report.pdf**

tortured for six months. Habib alleges that Australian officials were present when he was rendered from Pakistan and, on at least one occasion, when he was being interrogated by Egyptian security officers. On the basis of 'confessions' obtained under torture in Egypt, Habib was then rendered to Guantanamo Bay.

He was interviewed by Australian officials at Guantanamo Bay, and he complained about his torture and mistreatment. Australia referred the allegations to the United States for investigation.

These allegations give rise to serious questions about whether Australia has contravened its obligations under the Convention Against Torture. No Australian has been investigated or indicted for complicity in the torture of Habib.

In response to those serious allegations I called for an inquiry to be established with the powers of a Royal Commission, along the lines of the Canadian Arar Commission, to investigate the serious allegations of torture and mistreatment made by Mamdouh Habib. No Inquiry has been yet established.

Australia has announced on 1 March 2008 that it will implement the optional Protocol on the CAT.[14] We must ensure that its implementation deals directly with these issues. It is not clear whether any legislation associated with the implementation of the Convention will prohibit the practice of Rendition, or what effect, if any, it will have on preventing deportation of asylum seekers that face torture abroad. It is now time to eliminate the practice of Rendition, to ensure that no-one is ever again deported to their death and that our prisoners are incarcerated in a dignified manner.

I believe that the answer to many of these "trans-national" questions lies in full implementation of the CAT, a measure that Australia is considering at present. We should also implement the Optional Protocol to that Convention which establishes a mechanism for international bodies to independently inspect and report on incarceration facilities in Nations. While this would ensure that monitoring of facilities such as 'Supermax' occurs regularly its adoption has been rejected by the government.

All of these examples underscore the trans-national character of the challenges that implementation of the CAT involves. They also underscore the reason why its adoption would demonstrate our willingness as a nation to re-engage with the world on human rights issues.

In my view, Australia has a positive contribution to make to the international stage. It has always been represented 'above its weight' due to the many Australians who have made significant contributions to the development of international law.

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[14] "Australia to sign torture treaty that Howard spurned", Sydney Morning Herald, 1 March 2008 at **http://www.smh.com.au/news/national/australia-to-sign-torture-treaty/2008/02/29/1204226991242.html**

We should, as a nation be dictating our positive views on individual rights to others and working to create a world which respects all human beings. However, it is difficult to dictate and to convince others to change when our own record is marked by failure in these basic areas.

I am optimistic that the Rudd government is committed to restoring our position as a leading nation in the development of human rights but in order to distinguish itself it must first correct these two fundamental flaws which have been long ignored and inhibit our ability to press ahead.