The Bali 9 Case and the value of Australian citizenship

By Colin McDonald QC*

A speech given at a Criminal Lawyers Association Northern Territory (CLANT) dinner held at the Roma Bar, Cavenagh Street Darwin on St Patrick's Day, 17 March 2006.

Last week the President told me I was to make a speech at tonight's dinner. Whilst liberty, freedom, fairness of treatment and choice for individual Australians is part the raison d'etre of the Northern Territory Criminal Lawyers Association, it has never been part of the operational processes of the organisation. So I accepted the task with resigned acceptance. In doing so, I felt a bit like Deng Xiao Ping being recalled from the tractor factory assembly line to organisational headquarters and centre stage, so to speak.

I know speeches at the Roma Bar are fraught with peril: a critical, competitive, inebriated and unforgiving audience, the need for humour and brevity and, for God's sake, say something of value.

Life in the tractor factory, and working on the assembly line of justice for so many years, hasn't really left me with a rich repertoire of jokes. A stand up comedian I am not, except perhaps unconsciously sometimes in Court. I have set myself ten minutes to say something, something which I hope is of value to new members of this organisation. I do so in the Roma Bar which has been part of the life of CLANT for 17 of its near 20 years lifespan. The Roma Bar and its patient patrons Paul and Patty have put up with us for that long.

For those of you who took the long march with me and Ray Minahan those 20 years ago in forming CLANT I ask a little patience. But at the insistence of three past presidents I was asked to speak briefly about the history of CLANT, its values and the Bali 9 case and the significance of citizenship. By any editorial selection, too many topics for a 10-minute talk!

Strong as the temptation may be, I will avoid recounting the history of this organisation formed at the bibulous dinner nearly 20 years ago at the then Sheraton Hotel in Mitchell Street. Stories and accounts of our long march can perhaps await the actual celebration of 20 years and another more suitable forum. However, one link throughout those 20 years has been the Criminal Lawyers' bio diesel – alcohol and alcohol-affected speeches.

CLANT came into being in November 1986 to address essentially four issues:

1. To improve and promote professional relationships among criminal law practitioners;
2. To promote advocacy and debate on increased police powers and citizens' liberties;
3. To contribute and comment on laws and purported law reform in the criminal law area;
4. To promote issues of policy regarding the criminal law in a political environment where the views and insights of lawyers were either ignored, disparaged or condemned.

1986 was a time of increasing police powers, high custodial rates and sometimes questionable law reform. How history doesn't change in some ways. Today a Bill is in the Federal Parliament the purpose of which is to allow authorities to tap innocent persons' phones, we have seen unprecedented powers given to ASIO and the Federal Police as part of the so called War Against Terror, fundamental concepts of burdens of proof and presumptions get changed almost as a matter of course. All with little debate. So organisations like CLANT remain important, indeed precious.

Just as the Roma Bar has been part of the history of the Criminal Lawyers Association, so too has Indonesia, Bali in particular. It is in Bali that CLANT has held nine very successful conferences that have contributed to the life, policy and content of the law over the last 20 years. Long may this valuable conference in Bali continue. If we live

our lives by DFAT travel warnings, we would be safer staying forever isolated at home!

Rather than a history of CLANT which should be left until August 2006 when CLANT turns 20, I would prefer to say a few words – well make a few points – arising from a case I was involved in in Bali and in the Federal Court last year and earlier this year – the Bali 9 case.

The context of the Bali 9 case was straightforward – nine young Australians arrested and detained in Bali on drug offences carrying the death penalty. The upshot of the combined litigation in Indonesia and Australia was not straightforward. The cases of the nine raised, inter alia, a serious question about the value of Australian citizenship and "the supreme right" referred to Article 6 of the International Covenant of Civil and Political Rights (ICCPR) – "the inherent right to life".

This is the first time I have spoken publicly about the case, which occupied me for over nine anxious months. I had not experienced before the pressure and the chilling dimensions of acting for clients who faced the death penalty.

The trials in Denpasar and the application in the Federal Court in Darwin disclosed the following:

* At least seven of the Bali 9 were under surveillance in Australia before they left Australia;
* Parents or an intermediary sought to have the AFP stop or warn Scott Rush from going to Bali and participating in anything illegal or wrong;
* The AFP ignored the parent's request;
* The AFP liason officer in Bali, on instructions, alerted Indonesia police to the existence of the drug couriers and (in writing) requested assistance and to take whatever action they consider necessary;
* The nine were arrested "red handed" so to speak on 17 April 2005 at the Denpasar airport and the Melasti Hotel;
* They were immediately detained under primary Article 82 of the Indonesia Narcotics Code which carries the potential death penalty;
* The Australian Federal Police (AFP) co-operated with the Indonesian National Police (INP) until about August/September 2005 under a practical guideline drafted for a common law system rather than a civil law system where cooperation can be given in death penalty charge situations up until charge. In common law countries you are charged at the time your liberty is first interfered with - or soon after arrest. In civil law countries a person is charged only at the beginning of the trial;
* In essence, to use the evocative words of a journalist covering the Bali 9 case – nine young Australians were hung out to die by the AFP;
* The AFP Commissioner still defends the actions of the AFP and brands any help that the AFP might have given to Scott Rush's parents as acting "dishonourably" and "corruptly". Whatever happened to that aspect of policing called crime prevention? Since when is it dishonourable for a police officer to warn?
* The arrest, detention, trial and sentence process seemed to achieve little for everyone involved, but a fundamental value of our society was exposed and compromised – Australian citizens getting the death penalty, as two of the Bali 9 did;
* Australia abolished the death penalty in 1973. That great reforming Prime Minister Gough Whitlam moved the legislation through the House of Representatives. The Bill was passed by an overwhelming majority in both Houses on a conscience vote. The essential reasons for the abolition being the barbaric nature of the death penalty, uneven imposition and its demonstrated lack of deterrent value!
* Australia signed the Second Optional Protocol on Civil and Political Rights aiming at the abolition of the death penalty in October 1990. This combination of formal domestic and international acts declared to the world that Australia is opposed to the death penalty and committed to its abolition worldwide.

Nowhere in Australia could any AFP or other agency or officer expose an Australian citizen (or anyone else for that matter) to the death penalty. In our treaty relationships Australia makes provisions for reserving assistance in criminal matters where the death penalty can be imposed and the Attorney-General or his delegate in writing is made accountable.

Yet the Bali 9 case shows that the AFP can just dob Australian citizens in to foreign police agencies knowing there is a probability of the death penalty being imposed. Having dobbed them in, the AFP at one point sought to hide behind the wording of guidelines that allow assistance to overseas police until a person in 'charged'. The AFP position changed during the course of the litigation. But it became apparent that the AFP exposed nine young Australians to the death penalty without political supervision. The relevant Federal Ministers only

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found out about the momentous decision-making after the decisions were made.

So what are the implications for us as citizens?

Any thoughts Australians might have of Australians having a legitimate or reasonable expectation that they would not be exposed to the death penalty was corrected by Justice Finn's judgment in the Federal Court. The doctrine of substantive and enforceable legitimate expectations recognised in the Singapore Supreme Court, the Hong Kong Court of Final Appeal in *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFA 1 and the House of Lords in *R v Secretary of State for the Home Department; ex parte Zeqiri* [2002] UKHL 3 was held not to be available in Australia as Australian legal authority now stands.

His Honour held that any action against the Federal Police seeking to raise potential illegality of the AFP behaviour had no prospect of success. He held that Australia's many time declared antipathy to the death penalty had not been pursued unqualifiedly in our legislation. So there is a significant gap between the political rhetoric and the legal reality. The AFP or any other public servant can expose Australian citizens to the death penalty overseas with complete legal immunity. What is forbidden in Australia can be exported abroad.

Justice Finn at the commencement of his judgment said the case called for the need for a review of the procedures and protocols followed by members of the AFP when providing information to the police forces of another country in circumstances which could predictably result in the charging of a person with an offence that could expose that person to the risk of the death penalty.

Despite the judicial warning, the Minister for Justice and the AFP Commissioner have not accepted that there is need for a review.

So, a value fundamental to our society and at the heart of international human rights has been shown to have no effective legal protection in Australia. And despite the enormity of two Australians sentenced to death for crimes which in Australia would receive determinate prison sentences with likely non-parole periods imposed not even a review of the policy black hole revealed in the Federal Court judgement is conceded.

Whilst we reflect upon our Australian citizenship, let us not forget David Hicks, still awaiting trial at Guantanamo Bay. Other democracies have brought their citizens home and given them (even as outsiders) the protection of the value of citizenship. Not in Australia!

Are we losing respect for ourselves? If a fundamental value can be so easily side-stepped what place is left for basic ethical and humane values in our society?

So, amid all tonight's festivities let us no forget the reasons why CLANT came into being and that, in our professional efforts and service, the most important office in our democracy, that of citizen. The Bali 9 case reveals how fragile is our faith in the value of Australian citizenship.

Thank you

** Colin McDonald QC is a Barrister at William Forster Chambers, Darwin.*

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Central Australian Division of Primary Health Care

5 Skinner St (next to the Centre for Remote Health)