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THE PENALTY IS DEATH

EDITED BY THE HON. DR BARRY JONES AC

FOREWORD

BLACK FLOWERS - GOLDEN FLOWER

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The original version of this book, edited by Barry Jones, was published in 1968 in the aftermath of the hanging of Ronald Ryan at Pentridge Prison, Melbourne on 3 February 1967. Ronald Ryan was the last person in Australia who died in capital punishment.

The State of Queensland had its last execution in 1913. However, capital punishment remained in South Australia and Western Australia until 1964. It lingered on in Victoria until the hanging of Ronald Ryan, carried out on the insistence of Premier Henry Bolte. He was strong and successful on “law and order” politics. He won six elections in succession in Victoria. He was not interested in criminology, theology or philosophy. He pandered to a majority of electors who then supported capital punishment in Victoria, amongst other causes. It was only when he was replaced by his younger Liberal successor, Dick Hamer, that it became possible to get abolition of capital punishment through the Victorian Lower House. The editor of this

* Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Co-Chair, Human Rights Institute, International Bar Association (2018-21). See M.D. Kirby, “The High Court and the Death Penalty” (2003) 77 *Australian Law Journal* 811.

book, Barry Jones, played an important part in securing the majority that achieved that objective.

Virtually from its start, abolition of capital punishment had been a policy of the Australian Labor Party (ALP). State governments in Victoria and other States, formed by the ALP, played a major part in securing the fruits of abolition. They did so by removal of the punishment from State legislation but, also, earlier by narrowing the crimes to which it would apply and commuting the carrying out of the punishment where they could not gather enough parliamentary votes for abolition. There always remained (and still is) a lobby in Australia that supports capital punishment for so-called “extreme” crimes. It was to counteract and rebut that residual pressure that Barry Jones first published this book in 1968. As he points out in his “Update” for this book, there is always a risk of restoration in any jurisdiction. Every time there is an especially horrible murder, tabloid media and others demand restoration or stir the issue up once again.

The anniversary of the formal abolition of capital punishment by the Parliament of Queensland on 1 August 1922 affords an anniversary worth celebrating. We should reflect on the fact that it was Queensland that was the first jurisdiction in the then British Empire, to take that step. Breaking the log-jam of inaction was a crucial move that led the way for others to follow. Now more than half of the 200 nations, members of the United Nations have abolished capital punishment from their law. However, that still leaves almost as many nations that cling on to this form of punishment. In 2021, 3,400 people were executed in retentionist countries. Of these, astonishingly, 2,000 were executed in China.

There was a time when Australia was a leader in law reform that led the way in other countries. Votes for women; industrial arbitration; testamentary justice; and even abolition of capital punishment. It has now disappeared from all Australian States and Territories. Australia has signed on to the Second Optional Protocol to the *International Covenant on Civil and Political Rights* of 1976. However, there remain political leaders in Australia who, occasionally, try to tap the wellsprings of electoral popularity sometimes to be found in this idea. It is therefore timely to see this book republished, especially by its original editor. Although the first printing was 50 years ago, Barry Jones is still happily energetic, committed and persuasive on multiple ethical causes. Including this. Truly, he is a national treasure.

Barry Jones identifies the theories that kept capital punishment alive in our own land after many others had earlier embraced repeal. Nobel Laureate, J.M. Coetzee, wrote, in explaining his opposition to the retention, or restoration, of capital punishment, of the barbarity of state involvement in the premeditated extinguishment of a human life and the overwhelming objective proof that doing so did not have the suggested practical merit of reducing the incidences of serious crimes. For J.M. Coetzee, these were the two “black flowers” which explained his opposition to the retention, or restoration, of capital punishment. Yet, there is a third golden flower that can be identified in the advance of civilisation in our world. It is the golden flower of universal human rights that has enhanced civilisation since the Queensland abolition of capital punishment in 1922.

Increasingly, lawyers, theologians, philosophers, politicians and other citizens see capital punishment as incompatible with the universal values of the world after *United Nations Charter* of 1945 and the *Universal Declaration of Human Rights* of 1948, even without subscription to the Second Optional Protocol. At a time in history when such universal values are being endangered by a few, it is all the more important to restate and reaffirm the arguments assembled in this book. The days when nation states could suppress and destroy their own citizens and others have been replaced by a time when universal human rights are at the core of national and international law and policy and human commitment. There is a unity in this. Without the central wellspring of civilisation that includes respect for universal human rights, the risks of destruction of civilisation are ever present and ever more dangerous.

As I read this book again, so long after my first reading of it in 1968, I was reminded of an assertion by a judicial colleague who declared that the loss of the power of Australia's judges over the lives of its citizens had resulted in lamentable damage to the rule of law and respect for the judiciary as the arbiter of all things legal, including to the right of some to live or to die. I protested against this notion. Was he joking? No, I am sure that my colleague was serious about this thesis. Yet if he could embrace such an idea, how seductive such notions must be to others, of narrower education and experience.

For my own part, I continue to watch the international news reports of the ongoing moves to abolish capital punishment. Simon Locodo, a former Ugandan government Minister, remarkably for Ethics and Integrity, died in

January 2022, unrepentant over legislation introduced by him that imposed the death penalty for acts of homosexuality in his country. Fortunately, his enactment was struck down on a technicality by the courts. But his violent beliefs still live in many countries. In February 2022, Iran was once again reported to have executed two gay men. It is not the only country that has executed LGBT people and others for victimless crimes. Happier news has recently been welcomed from Papua New Guinea. Ironically, it inherited capital punishment in the original form of its criminal code borrowed from Queensland. Now, 45 years after independence, it has decided to repeal the death penalty. As new evidence gathered in this book reveals, during the Second World War, death sentences were imposed in grossly disproportionate numbers on 150 Indigenous people (often for collaboration with the enemy). This is a shocking fact, still largely redacted, that demonstrates the special vulnerability of the poor, uneducated and vulnerable to this form of punishment. And the tendency of autocratic government to hide such wrongs from the people.

So, these are some of the reasons for reprinting and updating Barry Jones's book and its collection of ageless writings on capital punishment by Cesare Beccaria, Charles Dickens, Albert Camus, Arthur Koestler, George Orwell and other greats. Certainly, it is still relevant to Australia. Clearly, it is timely for the wider world. The true foundation for the authority of the judiciary and other governmental institutions of Australia rests not on executions but on the adherence of its judges and people to constitutionalism and its respect for the human dignity of all people. No exceptions. Even those convicted of grave crimes. This is the message of this book. It remains relevant and timely in Australia, 100 years after the first abolition of capital punishment in

Queensland. It is more than ever a timely message for a wider world in which violence by states and their agencies is never far from human deeds and imagination.

A handwritten signature in black ink, appearing to read 'Wendell'.

Sydney,
18 March 2022