

Lex Lasry on the death penalty

The following is a transcript of a *Lateline* interview with (now Justice) Lex Lasry in October 2007

Tony Jones: Now to our top story and the decision by Labor's foreign affairs spokesman to apologise to Bali bombing survivors for his blunder on capital punishment.

Today the Government intensified its attack as Robert McClelland said he was wrong to suggest the Bali bombers should not get the death penalty for their crimes.

Lex Lasry QC is a prominent lawyer and human rights advocate. He unsuccessfully defended Van Tuong Nguyen who was executed for drug smuggling in Singapore in 2005. He is now representing two members of the so-called Bali nine, in a challenge to the death penalty in the Indonesian Constitutional Court.

Well, Lex Lasry, thanks for joining us.

Lex Lasry, Barrister: It's a pleasure, Tony.

Tony Jones: Who do you think has done the best job over the past few days of expressing a consistent principle of principle on capital punishment, John Howard or Kevin Rudd?

Lex Lasry: I don't think either of those options is open really. I must say from what I read of Robert McClelland's speech, he expressed the views that I agreed with and I think it's shame that it's been politicised in the way that it has since then.

Tony Jones: It also appears that he is backing off the principle that he espoused in the speech. Does that worry you?

Lex Lasry: Yes, it does, because what's important in this is to have a consistent policy on the death penalty so far as Australia is concerned. And the concern is that Australia's international moral authority, if you like, is being compromised because the policy isn't consistent.

Tony Jones: We appear to be having a kind of contest at the moment to determine who is the most uncompromising when it comes to the fate of Bali bombers. Now, Kevin Rudd says they should only leave jail in a wooden box or a pine box. The Prime Minister said today it would be very, very bad if they are not executed.

Lex Lasry: Yes, well, that's completely at odds with Australia's declared position. We don't have the death penalty here in Australia, we haven't had it since the 1970s. We don't execute terrorists. We support, internationally, the abolition of capital punishment.

Now you're either for that or you're not. As I understood the Prime Minister, he is for it and it seems to me that the sort of comments that you've just referred to are comments which are in a sense contrary to his declared position.

Tony Jones: Do you feel or see this debate shifting in Australia under your feet as it were?

Lex Lasry: No, I think the shame, Tony, is that the debate's been politicised. There's a political contest going on and there's an election coming up. And regrettably, the principles which are at stake so far as capital punishment are concerned are being somewhat lost in the kind of rush that you're talking about.

It would be a lot better if there was a bipartisan position which supported Australia's declared position since 1990 when we signed the – and supported and ratified the international covenant on this



– that Australia is simply opposed to the death penalty in all cases and in all countries.

Tony Jones: I was just going to say, these political messages are not going to be lost in Indonesia, are they? And I'm wondering how you think they will be read in Indonesia where you have two clients facing the death penalty.

Lex Lasry: Well, I think Australia's already had its critics over the last few years in South-East Asia for having an inconsistent message on the death penalty.

I have been asked and I have said a number of times that in Van Nguyen case, the Australian Government's support for us was excellent, I have never criticised that. But there is a problem about inconsistency, depending on the particular case.

So far as the Indonesian situation is concerned, we have... certainly our legal team has great faith in the Indonesian courts and the Indonesian Constitutional Court.

There is a judgment in that case imminent and I am sure the judges will do their judge duty as judges when they deliver their decision.

But it does send, I think, a very poor message and my concern is that Australia has the potential to lead a debate – not haranguing countries, not hectoring them – but leading a debate on desirability of reducing and eventually abolishing capital punishment. And the credibility of Australia's position is being lost in this sort of political battleground and I think that is unfortunate. And as you say, it won't be lost in South-East Asia.

Tony Jones: What I was specifically hinting at here is that even courts in Indonesia don't act totally in isolation of debates that are going on in the public arena, do they? So I guess I'm wondering if this particular debate has been unhelpful to your clients.

Lex Lasry: Certainly unhelpful. No question, unhelpful. And it's often the case, I suspect, that this sort of political point scoring is unhelpful. But the case that was conducted in Indonesia was a very detailed,

complex case. The Indonesian constitutional court gave the case a great deal of time and listened carefully to the arguments that were being put into the material and I am sure in the end the court will make its decision on that rather than on some political dispute in Australia.

Tony Jones: Indonesia is a Muslim country, there are very strict drug laws, obviously. I mean, would you agree there'd be plenty of Indonesians who would actually regard heroin smuggling as bad as terrorism?

Lex Lasry: There may well be. But I think Indonesia is also a country that is taking its developing democracy very seriously and wants to establish itself as a serious, important South-East Asian democracy.

And therefore they're interested in the complexity of this argument and I think they will take that seriously, notwithstanding that of course there will be views to the contrary, particularly in a country that size.

Tony Jones: But if you actually had judges who believed that heroin smuggling and terrorism both resulted in the taking of innocent lives, they may equate the two and take John Howard quite simply at his word – that if you should execute terrorists, then you should also treat drug smugglers without mercy.

Lex Lasry: Yes, well there is... Tony, I accept there is that risk but of course beyond that really I can't say because I don't know until we get the result of that case, I don't know what's in the minds of the judges who are hearing the case.

Tony Jones: Are you worried, though, that this debate will play into their decision in any way?

Lex Lasry: I'm confident in their process, Tony. I'm disappointed and I guess I'm worried because there will be other cases like this, presumably in the future.

And I think Australia... it now seems both sides of politics in Australia are missing an opportunity to maintain a principled and consistent message.

That will have its effect and it may have its effect in this case. It may have its effect in other cases. It's very difficult for the Australian Government to plead the case for Australians and select them as being more deserving of clemency than others in the context of a debate about capital punishment.

Tony Jones: By the same token, it is extremely hard political for the Australian Government to do or say anything that appears to make a case for clemency for the Bali bombers? And indeed as we now learned clearly for the Opposition and its strategists and its leader.

Lex Lasry: It may sound simplistic, Tony, but those of us concerned in the debate just want the killing to stop. And the simple response to that proposition is the state killing someone has never solved a problem, has never really resolved the criminality of what's gone before.

And we, I don't believe that executing anyone resolves the problem created by the crime they committed. As I say, I think those of us who support the abolition of the death penalty internationally simply say we want the killing to stop and state sanctioned killing is a particularly

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grotesque way to deal with people.

Tony Jones: The point about this principle is that it's a moral one...

Lex Lasry: Yes, that's right.

Tony Jones: And people appear to be choosing to take different moral positions and what appears to be happening is the moral position in Australia is slipping and sliding, depending on the case.

Lex Lasry: Yes, exactly. And that's the problem. That's the problem, that the principle that is under discussion in a sense is lost in the discussion about the instant case.

Australia's position in 1990, in signing the second optional protocol was clear – it's the Australian position in this country. We are opposed to the death penalty in all circumstances. It's not a complicated concept.

But of course, there's a harder argument to have in the terrorist case than for example in the more sympathetic case and perhaps I put my own client Van Nguyen in the more sympathetic case. But the hard part of the argument is to say, no, we really are against the death penalty for everyone, because we believe in the principle that supports that argument, whatever the case.

I think the consistency of the approach is crucial. Without that consistency, the credibility of the argument diminishes.

Tony Jones: On the moral issue, the Catholic Archbishop of Sydney, Cardinal George Pell, today said this issue probably wouldn't change too many Christian votes, which I found fascinating as a concept.

He says... because he says there's a clear... he believes there's a clear majority approval in Australia for capital punishment in certain circumstances. How would you gauge that message from a leader of a church, which actually holds a principled position against capital punishment?

Lex Lasry: Well, the primary position is that I hope he's wrong about that. I would hope – and I must say my own experience over the last

couple of years is that there's a very, very strong resistance to capital punishment and a strong part of the population that would resist any suggestion that it should be reintroduced here. And a lot of people who in particular cases, notwithstanding the fact that they're offended by the particular conduct, see the antiquity of capital punishment and I think that argument... I think worldwide the argument is growing. I think the level of the use of capital punishment is diminishing and I think that's having its effect on the argument here in Australia.

Tony Jones: Terrorism appears to be the issue which has changed people's ideas so fundamentally.

Lex Lasry: Yes.

Tony Jones: It wouldn't be that hard to shift focus from terrorism to drug smuggling, though, would it as they already have done in South-East Asia?

Lex Lasry: No, that's probably right. And, again, I think when you discuss the individual case and the individual offence, then inevitably you lose sight of the principle.

It depends what principle you're talking about. But if you're talking about the inherent inhumanity of the death penalty, then it really doesn't matter what the offence is.

And my complaint, of course, about politicians and now on both sides it would seem, is that they tend to pick and choose depending on what they perceive to be the public pressure and the discussion. I think there needs to be some clear leadership about it.

Tony Jones: Look, I make that point because it was clear at the time of the arrests of the Bali nine that in order to defend the position of his own policeman, the Federal Police Commissioner Mick Keelty came out and said very clearly that what these people are doing is causing the deaths of innocent people in Australia and then he cited the many thousands who died from drug over doses.

Lex Lasry: Yes, well, he did say that, and our position in this country – and I know to some extent I'm repeating myself – is notwithstanding that consequence we don't execute people here.

We don't execute people for murder. We don't execute people for any offences where death is an outcome of the criminal activity. That's because as a matter of principle we reject the death penalty as consistent with the values by which our community lives. I am simply saying that that position needs to be put consistently outside Australia.

Tony Jones: As a way of getting people to focus on what this actually means when it comes down to someone facing death, you've seen it up close, you didn't see the execution but you were there when it happened and you were there immediately before it happened with Van Nguyen. Can you explain what you went through experiencing that and what his family went through?

Lex Lasry: Well, it's a very difficult process certainly as a lawyer, Tony, something that I've never been through before. And because I think it's that... apart from anything else, apart from the emotion of it, there's something completely bizarre about sitting in a cell with a client and saying goodbye to that person, seeing the person in complete good health, knowing that person is in every respect completely rehabilitated and changed and contrite and knowing that the following morning at 6am that person will be dead.

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And there's a level of emotion and a level of desperation involved in that experience that is very hard to explain. But there is something about... as Sister Helen Prejean made the point in her book about Louisiana, about the very idea that the state would kill a person who at the time of their death is completely defenceless. And, of course, on the following day in some of the religious ceremonies that followed we actually saw the body of our client.

The contrast between what I saw on the day before and what I saw on the following day is something that will obviously live with me for the rest of my life.

Tony Jones: A final question then. Are you getting the same level of support now from the Australian Government to help you with the cases of the Bali nine as you received in the case of Van Nguyen?

Lex Lasry: Oh, yes. The Australian Government have been very supportive in the running of the case. They've been involved, of course, supporting our part in the constitutional case. Everything we've asked for they have provided and I can't complain about the way they've supported the case.

And I understand how they will make representations and what they will do during the future of the case to the extent that that's necessary. So I can't... I don't make any complaint about that.

Tony Jones: Lex Lasry, we thank you very much once again for coming in to talk to us tonight and taking the time, thank you.

Lex Lasry: Thanks, Tony.

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