1999 (*CSP Act*) and the principle in *R v Ellis*[7] when assessing whether the sentence imposed by the District Court was manifestly inadequate.

Section 23(1) of the CSP Act relevantly provides that a court may impose a 'lesser penalty than it would otherwise impose on an offender', having regard to the degree to which the offender has assisted law enforcement authorities in the investigation of the offence concerned. Section 23(3) of the CSP Act provides that a lesser penalty imposed under s 23 'must not be unreasonably disproportionate to the nature and circumstances of the offence'. The decision in *Ellis* is to similar effect.[8]

Justices Kiefel, Bell and Keane emphasised that the 'mandate' of s 23(3) is that a lesser penalty imposed with respect to an offender's assistance to authorities must not be 'unreasonably disproportionate' to the nature and circumstances of the offence. Their Honours observed that the term 'unreasonably' has been 'given a wide operation', and that it was a question 'about which reasonable minds might differ'.[9] Their Honours continued:

> In determining whether the sentences imposed by [the sentencing judge] were manifestly inadequate, the issue for the Court of Criminal Appeal was not whether it regarded non-custodial sentences as unreasonably disproportionate to the nature and circumstances of the offences but whether, in the exercise of the discretion that the law reposed in [the sentencing judge], it was open to his Honour upon his unchallenged findings to determine that they were not.[10]

The High Court remitted the proceedings to the CCA for determination according to law. On 25 June 2015, the CCA determined the remitted proceedings: *Attorney General for New South Wales v CMB* [2015] NSWCCA 166. The CCA found that the District Court had erroneously taken into account how CMB's disclosures would have been dealt with if the regulation had not been repealed (at [48]). However, having regard, in particular to CMB's time in custody whilst the High Court decision was pending and other subjective circumstances (including health issues), the court determined not to interfere with the sentences imposed in the exercise of its residual discretion.

Endnotes

*The author appeared as junior counsel for the attorney general in the High Court.

1. *Pre-Trial Diversion of Offenders Act 1985* (NSW).
2. *Pre-Trial Diversion of Offenders Act 1985,* ss 24 and 30.
3. *R v CMB* [2014] NSWCCA 5.
4. *R v CMB* [2014] NSWCCA 5 at [110] (internal reference omitted).
5. [2002] NSWCCA 489; (2002) 136 A Crim R 451 at 458 [12].
6. [2015] HCA 9 at [34], per French CJ and Gageler J; at [66], per Kiefel, Bell and Keane JJ.
7. (1986) 6 NSWLR 603.
8. *R v Ellis* (1986) 6 NSWLR 603 at 604.
9. [2015] HCA 9 at [78].
10. [2015] HCA 9 at [78].

Cruel and unusual punishment

Caroline Dobraszczyk reports on *Glossip v Gross*, 576 U.S. ___ (2015); 135 S.Ct. 2726 a decision by the Supreme Court of the United States on what constitutes cruel and unusual punishment.

On the same day that two Australians were executed in Indonesia, a very important case was being argued in the Supreme Court of the US. *Glossip v Gross* deals with a fundamental issue relevant to US death penalty cases, i.e. whether a very specific three-drug protocol, which is to be used in Oklahoma in the execution of numerous prisoners on death row, would constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Essentially, the Eighth Amendment prohibits the federal government from imposing excessive bail, excessive fines or cruel and unusual punishments, including torture. The US Supreme Court has ruled that the cruel and unusual punishment clause also applies to the states. The phrase originated from the English Bill of Rights of 1689.[1]

In *Blaze v Rees* 553 US 35 (2008) the Supreme Court held that Kentucky's three drug execution protocol was constitutional, based on the uncontested fact that 'proper administration of the first drug', which is a 'fast acting barbiturate' that created 'a deep coma-like unconsciousness', will mean that the prisoner will not experience the known pain and suffering from the administration of the second and third drugs, pancuronium bromide and potassium chloride – at 44. In *Blaze*, the plurality stated that a stay of execution would not be granted

absent a showing of a 'demonstrated risk of severe pain' that was 'substantial when compared to the known and available alternatives'– at 61.

In *Glossip*, it was argued on behalf of the petitioners, that Oklahoma intends to execute the petitioners using a three-drug protocol where only the second and third drugs to be used are the same as in *Blaze.* Importantly, and critical to the argument is the fact that Oklahoma will use as the first drug, midazolam, which is not a fast acting barbiturate. It has no pain relieving properties and the scientific evidence establishes that this drug cannot maintain a deep, coma-like unconsciousness.

The questions for the Supreme Court are as follows:

1. Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious.
2. Does the *Blaze* plurality stay standard apply when states are not using a protocol substantially similar to the one that this court considered in *Blaze*?
3. Must a prisoner establish the availability of an alternative drug formula even if the states' lethal injection protocol, as properly administered, will violate the Eighth Amendment?[2]

The brief background facts are that sodium thiopental, an anaesthetic which was the first drug used in *Blaze,* and which was described by Chief Justice Roberts as the key to an uncruel execution, has become increasingly difficult to get in the US. American drug manufacturers have stopped making it and European laws have banned exporting it.[3] However, this has not stopped executions, which can more appropriately be described as 'botched', with states using experimental drugs, with disastrous results. The execution of Clayton Lockett in Oklahoma on 29 April 2014, was one of the most serious. During the procedure, he stayed awake longer than expected, breathing heavily, clenching his teeth, rolling his head, trying to speak and trying to get off the gurney. A prisoner executed before him, Michael Lee Wilson had said, during the procedure 'I feel my whole body burning'. During Charles Warner's execution on 15 January 2015, after the midazolam was administered, he said 'My body is on fire'.[4]

During the hearing of the Glossip case, Justice Alito said to the counsel for the petitioners:

> Let's be honest about what's really going on here…. Oklahoma and the other States could carry out executions painlessly….is it appropriate for the judiciary to countenance what amounts to a guerrilla war against the death penalty?'
>
> …
>
> the States have gone through two different drugs, and those drugs have been rendered unavailable by the abolitionist movement, putting pressure on the companies that manufacture them so that the States cannot obtain those two other drugs…now you want to come before the Court and say, well, this third drug is not 100 per cent sure. The reason it isn't 100 per cent sure is because the abolitionists have rendered it impossible to get the 100 per cent sure drugs, and you think we should not view that as…relevant to the decision that you're putting before us?

But counsel for Oklahoma got an equally difficult time. He was bombarded with questions about whether midazolam would render the prisoner unconscious so that he wouldn't feel the pain from the other two drugs. Justice Kagan suggested to counsel that the facts on which the lower court's decision was based on were either 'gobbledygook' or 'irrelevant' and she referred to the evidence as to what could happen if the execution did not go properly, i.e. when the potassium chloride is administered to stop the inmate's heart 'it gives the feeling of being burned alive.' Justice Sotomayor told counsel that she was 'substantially disturbed' by statements in the state's brief that were not only 'not supported' by the sources on which it relied but 'in fact directly contradicted' by them.[5]

On 29 June 2015, the Supreme Court held that the petitioners had failed to establish that the use of midazolam violates the Eighth Amendment (Roberts CJ; Alito, Scalia, Kennedy and Thomas – Alito J delivered the opinion of the court. Breyer, Ginsburg, Sotomayor and Kagan were in dissent). The plurality held that the petitioners failed to establish that any risk of harm was substantial when compared to a known and available alternative method of execution; that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative; and that the District Court did not commit error when it found that midazolam is likely to render a person unable to feel pain associated with administration of the paralytic agent and potassium chloride. It is interesting to note that they also stated that:

> challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts. Although we must invalidate a lethal injection protocol if it violates the Eighth Amendment, federal courts should

> not 'embroil [themselves] in ongoing scientific controversies beyond their expertise…Accordingly an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain.[6]

Justice Stephen Breyer (with whom Justice Ruth Bader Ginsburg agreed) held that 'the death penalty, in and out of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment". He stated:

> The imposition and implementation of the death penalty seems capricious, random, indeed arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?[7]

There is no doubt that this topic presents even more challenging issues than ever before and is still one of the most hotly debated areas of law.

Endnotes

1. From Wikipedia, 'Eighth Amendment to the United States Constitution'.
2. From Brief of the Petitioners filed on 9 March 2015-www.scotusblog.com/case-files/cases/glossip v gloss.
3. From vox.com 'What you need to know before the Supreme Court's death penalty ruling' Dara Lind.
4. 'The Cruel and unusual execution of Clayton Lockett' by Jeffrey Stern, *The Atlantic*, June 2015 issue.
5. SCOTUSblog.com/2015/04/justices-debate-lethal-injection-and-the-death-penalty-in-plain-english by Amy Howe.
6. *Glossip v Gloss* 576 US (2015) at 1–2; 17–18.
7. from www.slate.com/blogs 'In a Brave, Powerful Dissent, Justice Breyer Calls for the Abolition of the Death Penalty' by Mark Joseph Stern.

Interview with Julian McMahon

Australians were confronted by the death penalty when Andrew Chan and Myuran Sukumaran were executed in Indonesia on 29 April 2015. Once again the arguments in favour of and against the death penalty were debated in the media and no doubt privately by many Australians. Carolyn Dobraszczyk spoke to Julian McMahon who is a barrister at the Victorian Bar, and who was one of the main Australian lawyers who acted for the two Australians.

Photo: Kate Geraghty / Fairfax

Julian McMahon: Sukumaran and Chan were arrested on 17 April 2005; they were sentenced to death on 14 February 2006; again in April; and again in August or early September 2006. In September, Lex Lasry QC who is now a Supreme Court Judge, and I were heading to Indonesia, having just been asked by the families to help. Our first job was to identify local lawyers. We have worked on cases in a number of countries and we always retain a local lawyer to run the case in court.... sometimes that is obligatory, and, even if it is not obligatory, it's generally a better idea than trying to get in as some kind of outsider and all of the problems that generates.

We need a local lawyer who is happy to work on behalf of our client and to work with the assistance of the Australian lawyers. These days we have a team, about eight of us, who work together as a group or in smaller numbers, and what we do is try to provide support to the local lawyer. That support would typically be similar to the role of junior counsel in a large brief on whom much reliance is placed, where senior counsel, whom we would call our local lawyer, is really asking junior counsel, 'what do you see as being the issues; is there other law around the world which can help us; have you analysed the brief; where can we go with these ideas?' Our job is to approach the case with a view to providing as much support as possible to the local lawyer.

In the case of Sukumaran and Chan, I asked friends and colleagues in a number of countries, around the world actually, who would be the best lawyer in Indonesia to work for my clients in circumstances where they had already been sentenced to death three times and I was given one name ahead of all the others constantly which was Todung Mulya Lubis, who runs a very successful commercial law firm – but like some of our Silks in Australia, and some commercial firms, he also has a human rights side to his life…and his career. He is internationally educated, an extremely competent lawyer and is briefed by the largest corporations in the world when they have problems in Indonesia. He is also famous for being scrupulously honest… He is a person whom I regard as being of great courage and integrity.