

# Transcript for the Hon. Dr Barry Jones AC, FAA, FAHA, FTSE, FASSA, DistFRSN, FRSV, FRSA, FACE

## Michael Kirby Justice Oration 2022

### Professor Lidia Xynas

Good evening everyone. I am Professor Lidia Xynas. I am the Dean of the College of Law and Justice here at Victoria University.

Let me begin with an Acknowledgment of Country.

We acknowledge the ancestors, elders and families of the Boonwurrung (Bunurong), Woiwurrung (Wurundjeri) and Wadawurrung (Wathaurung) people of the Kulin who are the traditional owners and custodians of the university land. As we share our knowledge practices within the university. May we pay respect to the deep knowledge embedded within the Aboriginal community and their ownership of country. We acknowledge that the land on which we meet is a place of age-old ceremonies of celebration, initiation and renewal and that the Kulin people's living culture has a unique role in the life of this region. Victoria University is committed to building better relationships and fostering greater understanding between the wider Australian community and Aboriginal and Torres strait islander peoples.

So thank you.

I would like to welcome all of you to this evening to the 11th Michael Kirby Justice Oration for Victoria University for 2022.

Special welcome to our patron, the Honourable Michael Kirby and also our orator for this evening. The Honourable Barry Jones AC who will be presenting our Oration this evening. I also would like to welcome our chancellor, the Honourable Dr Steve Bracks, his wife, Terry Bracks and our Vice Chancellor, Professor Adam Shoemaker and the Deputy Vice Chancellor of Higher Education, Professor John Germov. So now I would like to hand over the proceedings to the Honourable Steve Bracks who will continue. Thank you.

### Hon. Steve Bracks AC

Thank you very much Lidia. Well, thank you very much for that welcome. And it's a great honour of course to have the 11th Michael Kirby Oration here and even greater honour to have Barry Jones AC who will be delivering the oration as well. But could I acknowledge that we have many distinguished people here. We have 3 former chancellors in the audience as well. Peter Lavor, a former Chancellor of Victoria University, it's great to see you here. Justice Frank Vincent, a former Chancellor of Victoria University is here and a former Chancellor of the Australian National University, the Honourable Gareth Evans is here as well.

So, I am in esteemed company as a current chancellor to have three former chancellors here present at this for this oration as well. This oration as you've heard was established in 2010 and it was established to provide a platform for leaders within our community to share their experiences deep understanding knowledge and reflections on issues of justice and what a better name the oration could be in, then the Honourable Justice Michael Kirby as well.

I'd like to especially acknowledge the Honourable Michael Kirby AC. Michael Kirby is an

international jurist, educator and former judge. He was the Justice of the High Court of Australia between 1996 and 2009 and over the last decade, the annual Kirby orations at VU continue to pay tribute to justice and human rights issues. Michael's relationship as friend, colleague and mentor to Victoria University and the College of Law and Justice is also significant. Michael Kirby is an Adjunct Professor in the College of Law and Justice here at Victoria University and thank you very much Michael for being here as well.

I'm also very pleased to now introduce our orator for the 11th Michael Kirby Justice Oration for 2022. The Honourable Barry Jones AC .

Barry's topic for the oration is the death penalty, populism and democracy. Barry has been a teacher, lawyer, academic writer and politician, a labor member of the Victorian Parliament between 1972 and 1977 and the Commonwealth Parliament between 1977 and 1998. He led the successful campaign in Victoria to abolish the death penalty and in fact, it was part of my political awakening when that was happening when Barry was leading that campaign here in Victoria. Barry is Australia's longest serving Minister for Science. He served as the Minister for Science between 1983 and 1990. He was the first politician to draw attention to the existential challenge of climate change and global warming and the way that the IT Revolution would transform employment and politics. He represented Australia in Paris at UNESCO between 1991 and 1995 and the World Heritage Committee between 1995 and 1996 has consulted for the OECD.

Barry's accolades are so long that I'm only going for a sample of them by the way. I know we've got to get onto your oration Barry, but I'll do a sample.

Barry is the only person elected to four of Australia's five learned academies and I understand that is extremely hard to be elected to one. Barry has been elected to four. He became a living treasure, a living national treasure in 1997 and was made a companion of the Order of Australia, the nation's highest award in 2014.

What is to be done? Political engagement and saving the planet- was a bestseller in 2020 and as you know, the Penalty is Death, first published in 1968 has had a second edition updated and much expanded in 2022. And I know that's available for people to purchase here as well.

So, I wonder if you can join with me in welcoming the Honourable Barry Jones AC to deliver the Michael Kirby Justice Oration for 2022.

### [Hon. Dr Barry Jones AC](#)

I am greatly honoured to have been invited to deliver the 2022 Michael Kirby Oration, to celebrate his outstanding contribution, not just in Australia but to humanity.

I have known him since 1975. One of Australia's 100 'Living National Treasures', I would rank him at the top of the list.

He first attracted public attention as the first chair of the Australian Law Reform Commission 1975-84. Its members included Sir Zelman Cowen, later Governor General 1977-82, Sir Gerard Brennan, Chief Justice of the High Court 1995-98, John Cain, Premier of Victoria 1982-90 and Gareth Evans Attorney-General 1983-84 and Minister for Foreign Affairs 1988-96.

Michael Kirby holds the dual records of being the youngest person appointed as a judge and the longest-serving member of Australia's judiciary 1975-2009.

Michael Kirby: Paradoxes & Principles (2011) by A J Brown is a scholarly work on his influential work in shaping the law. Kirby J was a frequent dissenter on the High Court, but with the passage of years his dissents seem unusually prescient, especially on ethical, scientific and technical areas, reflecting his deep knowledge of the biological and information revolutions.

As Minister of Science I asked Michael Kirby to become a Board Member of CSIRO (the Commonwealth Scientific and Industrial Research Organisation) and he served 1983-86. He played an extremely valuable role in issues as diverse as setting priorities, guaranteeing international property rights and redefining ethical standards. His capacity to master a brief is almost unparalleled in my experience. He was President of the International Commission of Jurists, Geneva 1995-98. He drafted a major report on privacy issues for the OECD (1999). He drove development of the Universal Declaration on Bioethics and Human Rights, adopted by the General Conference of UNESCO in 2005. He also served for a decade on the Ethics Committee of the Human Genome Organisation (HUGO), London, at that time the largest cooperative scientific project in history. His reports for the United Nations on violations of human rights in Cambodia (1993-96) and North Korea (2013) were outstanding. He made an important international contribution to tackling human rights issues arising from the HIV/AIDS pandemic.

The Charter of the Commonwealth (2012) setting out sixteen core beliefs of the 54 nations in the Commonwealth was largely shaped by him.

He has had a long history of involvement in the process of law reform in the United Kingdom, India, New Zealand and other Commonwealth countries.

The Kirby Institute in Sydney, founded in 1986 but renamed for him in 2011, conducts research in Australia and the neighbouring region on infection and immunity in society.

He has been awarded 30 honorary doctorates, a record for Australia. He is a great humanitarian, selfless, generous, a strong supporter of the arts, tireless in his commitment to justice, openness, fairness, education, ending slavery, torture and the death penalty.

I can think of only one public policy issue where we (politely) disagree.

TPiD

The first edition of this book was published in 1968, in the aftermath of Ronald Ryan's hanging at Pentridge on 3 February 1967. He was the last of 2,140 people to be executed in Australia since 1629, 187 of them in Victoria. In 1968 capital punishment had been abolished as the penalty for murder in only thirty nations, although there was a moratorium on its use in many more. In 2022 the number of abolitionist nations has risen to 108, and fifty-four more have a long-standing moratorium. In 2021, among retentionist states, there were no recorded executions in India, Bangladesh, Singapore, Pakistan, Indonesia, Japan, Nigeria, Taiwan, Belarus, and South Korea.

### **What is the relevance of debating the death penalty in 2022?**

Capital punishment is a central metaphor/analogy about the problems of state power, the fallibility of human judgment, flaws in rigid institutions, the use of special pleading, and the danger of making decisions that are irreversible. The World Coalition against the Death Penalty reported the number of recorded executions internationally in 2021 at 2,397, with at least 2,000 in China. The total figure is probably far higher, because China keeps details of its executions a

state secret. An estimated 33,000 people are currently under sentence of death, globally.

China executes for murder, drug trafficking, official corruption, financial crimes, and robbing ancient cultural sites. However, the number of executions fell significantly from 12,000 in 2002 to 6,500 in 2005. Many of those convicted (and acquittal is very rare) may be sentenced to death, subject to a reprieve.

Iran, with a population of 83 million, has a higher execution rate per capita than China. In addition to murder, treason, and drug- trafficking it is enforced for a far wider range of offences, including sodomy, rape, incest, pedophilia, adultery (for repeat offenders), producing pornography, political dissidence, apostasy, blasphemy, some economic crimes, and 'enmity against God'. There were 977 executions in 2015, when Hassan Rouhani, regarded as a moderate, was president; 507 in 2017; and 365 in 2021.

Egypt ranks third among executing states. In the decade 2011-21 the Muslim Brotherhood sentenced to death 2,182 people, including children, mostly for political offences. In 2020 there were 152 executions, which was a record, and more than 100 in 2021.

Vietnam executed 429 people in the period 2013-16, but capital punishment is a state secret, and recent figures have not been released. Saudi Arabia executed sixty-seven prisoners in 2021, but there have been some reforms: an indication that juveniles will not be executed, and that penalties for drug-related crimes will be reduced. In March 2022 there were eighty-one executions, mostly political, including Yemeni nationals and members of al-Qaeda.

In Australia, the Criminal Code Amendment Bill, providing for the abolition of capital punishment, was introduced into the Queensland Legislative Assembly in September 1916, during the premiership of Thomas Joseph Ryan<sup>2</sup> (1876-1921), by the assistant minister for justice, John Fihelly. He modestly argued that his Bill 'was by no means a novel enactment', contending that the death penalty was on the way out everywhere. 'In the United States it has been practically abolished', he said and drew attention to Italy, the Netherlands, and Belgium. Oddly, he did not refer to the United Kingdom or the other Australian states.

The 1916 Bill was carried 37-14 in the Legislative Assembly, but was blocked by the conservative Legislative Council, a body that was then entirely appointed. In 1921 Premier Edward Granville ('Red Ted') Theodore, later Commonwealth treasurer, persuaded the governor of Queensland, Sir Matthew Nathan, to appoint enough new members (soon dubbed 'the suicide club') to vote the Legislative Council out of existence. On 1 August 1922 capital punishment was abolished in Queensland for all crimes, the first jurisdiction in the then British Empire to do so. The Criminal Code Amendment Act, moved by attorney-general John Mullan, was passed by the Legislative Assembly 33-30.

The centennial in 2022 is an appropriate time for reflection and celebration. Queensland had its last execution in 1913, New South Wales in 1939, Tasmania in 1946, the Northern Territory (under Commonwealth law) in 1952, South Australia and Western Australia in 1964, and Victoria in 1967. Between 1901 and 1964 Western Australia executed more than any other Australian state, and was the last to abolish the death penalty for murder.

First Nations people in Australia had strict codes of punishment, some of which may have resulted in death, but execution as a ritual begins in Australia with European intervention. In October 1629, seven Dutch mutineers (and murderers), survivors of the sinking of The Batavia, were hanged by the Dutch East India Company (VOC) on Seal Island, on the Houtman

Abrolhos Islands, off the coast of Western Australia. The First Fleet began the occupation/settlement of Australia in January 1788. The first execution took place in Sydney just one month later, when Thomas Barrett, aged seventeen, was hanged for theft. The first twenty-four executions in New South Wales were for stealing or burglary.

In Australia (and Norfolk Island) there were seven hangings in the seventeenth century, 380 in the eighteenth, 1,630 in the nineteenth, 118 in the twentieth, and none in the twenty-first.

Not all executions took place in, or outside, Australian prisons. There were extra-judicial killings of Aboriginal people — probably thousands.

### **Arguments for abolition**

The death penalty is deeply embedded in our culture, and probably our psyches. It was inextricably linked with imperialism, colonialism, and Christianity, too. The crucifixion of Jesus, by a Roman method, is central to the Church's history and teaching, to its liturgy and art. For millennia the practice of execution was virtually unchallenged.

Michel de Montaigne, the great French essayist — and magistrate — neatly set out his reasons for opposing the death penalty: Judgments normally inflame themselves towards revenge out of horror for the crime. That is precisely what tempers mine: my horror for the first murder makes me frightened of committing a second, and my loathing for the original act of cruelty makes me loath to imitate it. (On Physiognomy, 1588).

The Milanese economist Cesare Beccaria in *On Crimes and Punishments* (*Dei delitti e delle pene*), published in 1764, argued for the abolition of the death penalty with a classic simplicity: there is no demonstrable correlation between the severity of punishment and the crime rate; all punishment deters, but there is no statistical evidence that execution, or torture, deters uniquely. Essentially, there have been no new arguments for abolition since Beccaria.

Leo Tolstoy, the pre-eminent Russian novelist, observed the guillotining of a murderer, Francis Richeux, in Paris on 6 April 1857, and the image haunted him all his life.

I witnessed many atrocities in the war and in the Caucasus, but I should have been less sickened to see a man torn to pieces before my eyes than I was by this perfected, elegant machine by means of which a strong, clean, healthy man was killed in an instant. In the first case, there is no reasoning will, but a paroxysm of human passion; in the second, coolness to the point of refinement, homicide-with-comfort, nothing big. When I saw the head part from the body and each of them fall separately into a box with a thud, I understood — not in my mind, but with my whole being—that no rational doctrine of progress could justify that act, and that if every man now living in the world and every man who had lived since the beginning of time were to maintain, in the name of some theory or other, that this execution was indispensable, I should still know that it was not indispensable, that it was wrong.

Tolstoy recorded his observation in his diary, and published it in his essay *What is To Be Done?* (1886). I quoted it in my 1975 speech in the Victorian Parliament on the abolition of the death penalty.

Ultimately, all executions are political. Their exercise is arbitrary, often capricious, and irrevocable. It depends on geography, too, as Blaise Pascal noted in his *Pensées*, no. 434: Three degrees of latitude upset the whole of jurisprudence and one meridian determines what is true ... It is an odd sort of justice whose limits are marked by a river, true on this side of the Pyrenees, false on the other.

The Canadian philosopher Ronald Wright argues:

States arrogate to themselves the power of coercive violence: the right to crack the whip, execute prisoners, send young men to the battlefield. From this stems that venomous bloom which J.M. Coetzee has called 'the black flower of civilisation'—torture, wrongful imprisonment, violence for display—the forging of might into right. States employ 'various styles of human sacrifice' as forms of 'the ultimate political theatre'.

### **Executions and the 'war on drugs'**

By the mid-1980s in Australia, de facto abolition had become de jure. However, the death penalty returned to the news when Australians Kevin Barlow and Brian Chambers were hanged in Penang, Malaysia, in July 1986 for drug offences. Prime Minister Bob Hawke called the act 'barbaric'. There were strong diplomatic representations, bipartisan political protests, and a surprising degree of media coverage, all of which reinforced the intransigence of the Malaysian authorities. Chambers' sister talked to me, but there was no more I could do as a minister because the Hawke government had already offended Prime Minister Mahathir Mohamad by its strong protests. The ALP's national conference was meeting in Hobart on the morning of the hangings, and I read John Donne's words, 'No man is an island ...'. The atmosphere was electric.

A Queenslander, Michael McAuliffe, was hanged in Penang in June 1993, also for drug-trafficking, but the event passed virtually unnoticed, and without protest, because the victim apparently accepted his fate.

Nguyen Tuong Van, aged twenty-five, an Australian citizen of Vietnamese origin, was hanged in Singapore in December 2005 for carrying drugs for his brother from Cambodia to Australia and being caught in transit. Under Singapore's mandatory death penalty, a system applied with equal inflexibility in China, mitigating circumstances were irrelevant. It would be impossible to characterise Van Nguyen as the criminal of the year, or the century, but his penalty would have been no greater if he had been. Execution is the ultimate demonstration of state power; there are no chance factors, and the victim becomes a passive object, even before he/she dies. In some jurisdictions, cost is a major factor: execution is far cheaper than lifelong imprisonment.

Indonesia's execution by firing squad on 29 April 2015 of eight people convicted of drug offences, among them the Australians Andrew Chan and Myuran Sukumaran, revived domestic concerns about capital punishment to higher levels than any time since the 1960s, although public opinion polls suggested that Australians were evenly divided about their case.

In 1991 Australia ratified the Second Protocol of the International Convention on Civil and Political Rights (ICCPR), which binds nations to oppose the death penalty and has been adopted by the UN General Assembly.

Australia has been monumentally hypocritical about the death penalty abroad. We will not extradite persons held here to death-penalty jurisdictions, even to our close ally the United States. But we are also highly selective. We empathise with our fellow citizens, and will campaign to save them, but fail to argue strongly enough for the general principle of opposition

to the death penalty. Chan and Sukumaran had good reasons to expect clemency. They were exporting drugs from Indonesia, not taking them in. If the Australian Federal Police had waited to arrest them on returning with drugs to Australia, they might well have received only short prison terms. There was no contesting the evidence that they had been dramatically rehabilitated during their decade in prison.

Andrew Colvin, the AFP commissioner, in an organisation-serving press conference, complained that attacks on the AFP's involvement in the execution of Chan and Sukumaran had been in 'very bad taste'. One's heart went out to him. Colvin's justification for the AFP's role in ensuring that Chan and Sukumaran were arrested in a death penalty jurisdiction was that between 2007 and 2011 some 4,100 Australians had died from heroin overdoses. His logic was dubious.

In Australia, drugs of addiction fall into two categories: legal and illegal. Which kills more of our citizens? Legal drugs. While there are restrictions on how tobacco products are sold, advertised, and packaged, cigarettes remain a legal product. The Australian Bureau of Statistics estimates that in 2021 smoking killed 20,500 Australians, which represented 13 per cent of deaths in that year. In 2020 alcohol-related deaths in Australia totalled 6,000. While nobody in the AFP recommends death or even imprisonment for tobacconists or alcohol retailers, or the corporations behind them, we should reflect on the monstrous hypocrisy of the 'war on drugs'.

The AFP's conduct was immoral and indefensible. As Brian Walters, SC, observes - Under the Extradition Act, or under the Mutual Assistance in Criminal Matters Act, provision of assistance to a foreign country that might result in the imposition of the death penalty is illegal. The provision of information in this instance was not caught by either of those pieces of legislation, but the principle ought to be the same, and it ought to be a crime for Australian law enforcement authorities to provide intelligence or assistance to foreign countries in the absence of an undertaking that no death penalty would be imposed as a result. Such an undertaking should be sought in advance on a generic basis.

One of the sickening aspects of execution for drug offences is that only mules are caught. Those who control the drug syndicates just read about the executions on Facebook. With murder, there can be no crime, no conviction, without an identifiable victim or victims. Executions and the 'war on terror'.

There are disturbing similarities between having a 'war on drugs' and a 'war on terror'. Each punishes the potentiality for death and destruction, and challenges, even undermines, the basis of how law and justice ought to be administered. Evaluation of evidence, deep analysis, rationality and causality may be discarded or suffer collateral damage.

In the case of the execution of Amrozi and two other Bali bombers, in 2008—after an appalling act of terrorism in October 2002, killing 202 people, eighty-eight of them Australian—Kevin Rudd and John Howard both declined to make representations to Indonesia on the general principle of opposition to the death penalty. Simon Crean, as Labor leader, had been equivocal at the time of the Bali bombing. Mark Latham, his successor, had supported John Howard on the execution of Saddam Hussein in 2006.

Saddam's hanging was very important to older neoconservatives in the US, eager to draw parallels between Hitler and Saddam, the Nuremberg Trials, and the Baghdad Trials. Brutal as Saddam's crimes were over a long period, it was a supreme irony that he should be sentenced for a massacre that occurred in 1982 in Dujail, when he was being supported by the US in his war against Iran and was a valued customer for weapons of mass destruction.

### **Executions and changing public opinion**

Capital punishment is a clear example of where elites—political, legal, judicial, medical, philosophical, and creative — are usually well ahead of public feeling.

The case of Ronald Ryan in 1967 had been an important factor in recruiting young people to political activism, perhaps second only to the Vietnam War, Steve Bracks being a prime example. Nevertheless, Sir Henry Bolte cruised to victories in the Victorian elections in 1967 and 1970. But Bolte's successor, Dick Hamer, was a convinced abolitionist and, following the long campaign by Jack Galbally, Labor's Upper House leader, worked with me to repeal the death penalty in 1975.

Public opinion polling by Roy Morgan Research indicated that support for capital punishment in Australia fell from 68 per cent in 1953 to 23 per cent in 2009, although in a 2014 poll this figure rose to 52.5 per cent for 'a deadly terrorist attack'. The only political leaders currently advocating restoration of the death penalty are One Nation leaders Pauline Hanson and Mark Latham.

### **Wartime executions by the AIF in Papua New Guinea**

The numbers of executions in Papua New Guinea under colonial rule (first Germany in New Guinea, then Queensland, and then the Commonwealth in Papua) are elusive, but there may have been almost sixty until hangings ceased in 1954.

In Papua New Guinea in 1943 and 1944, the Australian Imperial Force (AIF) tried, convicted and hanged about 150 indigenous people in remote areas, mostly for murder, but often for collaboration with Japanese forces. These punishments, carried out in public, but not reported to the Australian government, now seem inexplicable.

In 1959 I was told about these extraordinary executions by Alf Conlon, a consummate networker who advised both John Curtin and Sir Thomas Blamey as head of the army's Directorate of Research and Civil Affairs (DORCA).

In May 1978 I delivered a speech in the House of Representatives about what I had been able to glean from the mutilated files in the Australian National Archives (ANA) about the hanging of thirty-four New Guineans at Higaturu by the AIF in September 1943:

The New Guineans all lived in a small area to the east of the Owen Stanley Ranges, near the point of cultural 'interface' where territory was successively occupied by Germans [before 1918], Australians and Japanese. If there was any lesson that these people and their families must have learned, it was that foreigners—whether German, Australian or Japanese—wearing a uniform and an air of authority were in a position to enforce their wishes and had to be obeyed without question. Treason is a highly conceptual crime involving an understanding of legal obligations to the Australian State or the British Crown, and the significance of breaching them. In the first batch of trials the sentences were referred to and apparently confirmed by the General Officer Commanding (GOC) the 1st Australian Army, Lieutenant General Sir Edmund Herring, later Chief Justice of Victoria, in his capacity as Administrator of the Australia- New



Guinea Administration Unit (ANGAU).

I received more hate mail after this speech than on any other issue in my career. Some of the angriest letters contained important new evidence. I didn't know what I was talking about, my informants wrote; the hangings had not been at Higaturu, but at Samarai/Milne Bay, Aitape, Lae, Rabaul, Port Moresby, and in the Sepik, where they had been witnesses. The numbers began to rise sharply, to more than 100.

It is clear that the Australian Army was very careful not to tell the Australian government what it was doing, and when Prime Minister John Curtin found out in April 1945 he ordered the executions stopped.

The few files remaining in the ANA reveal that after cabinet directed the then GOC, Lieutenant General V.A.H. (later Sir Vernon) Sturdee not to proceed with hanging about fifty Papua New Guineans, in July 1945 he sought legal advice from the director of Army Legal Services, Brigadier Alan S. Lloyd (later a judge in New South Wales) as to whether he was bound to follow cabinet's direction. Lloyd replied, drily, that while the GOC might not be legally compellable, a reading of history suggested a certain caution: had he failed to comply, 'the consequences might not have been happy', because 'Cabinet enforces compliance ... by removing from office any public servant who flouts its instructions'. The oddest feature of the incident was to find a GOC urging execution as a matter of military necessity within weeks of Japan's surrender.

Because the official files had been gutted, it is impossible to form a judgment about:

1. How many indigenous Papua New Guineans were executed, and where and when.
2. The precise nature of the charges—was it murder, rape, treason, collaborating with the Japanese?
3. The nature and quality of the evidence.
4. How the trials were conducted and by whom.
5. Whether the accused had the benefit of defence counsel.
6. Whether prosecution witnesses were subject to cross-examination.
7. What languages the trials were conducted in, and whether translators were available.
8. The average duration of each trial.
9. Whether there was a right of appeal against conviction and sentence.
10. How much time elapsed between conviction and execution?
11. Whether there were any commutations?
12. Whether full records were kept.
13. Who was the driving figure behind the trials and executions.
14. Why, if the aim of the hangings was deterrence, they were kept secret.
15. Why Canberra was not briefed.
16. Why the military historians ignored the hangings.
17. Who mutilated the national memory?

There are other disturbing issues. Significantly, the executions were, in effect, redacted from The Australian Official War History. These trials and executions had occurred at the same time as action on the Kokoda Track, when indigenous Papua New Guineans received very sympathetic press coverage in Australia as 'the fuzzy-wuzzy angels', so savage punishments, carried out in public, but unreported, are inexplicable. Was it to encourage enthusiasm for the Allied cause?

And there is also the question of proportionality.

The number of AIF executions in Papua-New Guinea over two years was about 150—thirty-five

more than all executions in Australia between 1901 and 1967.

### **American exceptionalism**

In the United States, the death penalty has now been abolished in twenty-three states and retained in twenty-seven, but with a moratorium in force in California, Ohio, Oregon, and Pennsylvania.

The penalty remains under military law and for some federal crimes, although a moratorium is in force under Joe Biden's presidency. Donald Trump had been an enthusiast.

Capital punishment is more likely to be abolished in the US by executive order (moratorium) or by judicial activism than by legislation: it would be hard to pass in the Senate.

The twenty-three retentionist states are all in the Old South, the sparsely populated Midwest, and the border states of Oklahoma and Missouri.

The death penalty has been abolished in Europe, South America, many African states, and in every other nation in the English-speaking world. It is subject to a moratorium in Russia, and generally remains throughout Asia.

Support for the death penalty is one of the few social policies that the US has in common with China, Iran, Egypt, Iraq, Saudi Arabia, and North Korea.

Religious fundamentalism is a powerful force in the US, and Christian fundamentalists are among the most zealous supporters of judicial execution. They rely on a highly selective reading of the Bible. On my reading of the New Testament, it is hard to see Jesus, a victim of execution himself, as a hard-line retentionist.

Fundamentalists rely on the Mosaic code, which provided death for many crimes, including murder, witchcraft, and cursing parents—although the last two are no longer insisted on. It is worth recalling that as an expression of the prevailing thinking of the Hebrews when they were nomads without penitentiaries, the Mosaic law expressly endorsed slavery. Those who insist that capital punishment is 'God's law' still read that law selectively.

Eleven executions were carried out in the US in 2021, the lowest number since 1988. Three of them were federal, in the last week of Donald Trump's presidency, as a farewell gesture; three in Texas, maintaining its record as the state ranking first for executions; two in Oklahoma; and one each in Alabama, Mississippi, and Missouri. All five states had been in the old Confederacy or on the border, with a history of slavery, racism, and lynching. A common factor was the very long period between the crime and execution in 2021. The shortest period was eleven years, in Texas and Mississippi; the longest, thirty-seven years, in Oklahoma.

Only eighteen death sentences were imposed in 2021 in the US.

Paradoxically, in California, referenda to abolish the death penalty were defeated in 2012 and 2016, just when Barack Obama and Hillary Clinton won large majorities in the presidential elections.

Lethal injection is the method of choice for most retentionist states. It is more palatable for the squeamish and may have weakened some objections to execution because it resembles a medical procedure that always results in the patient's death, without screaming or struggling. It is less grisly or shocking than other methods, with their images of blood, mutilation, sparks, burning flesh, the coup de grace, and the occasional decapitation.

The US Supreme Court is less preoccupied with the moral issue of whether to execute or not, but with techniques: how best to execute, especially when pharmaceutical companies have qualms about providing lethal drugs, as it would be unthinkable to challenge intellectual property rights.

President Obama used to campaign against the death penalty, and it has been abolished in his home state of Illinois. However, President Trump was a death-penalty enthusiast. President Biden declared himself an opponent of capital punishment, and all current death sentences under federal law are subject to a moratorium.

But there are puzzling inconsistencies. The bombings at the Boston Marathon in April 2013 resulted in three deaths and 280 injuries. Dzhokhar Tsarnaev, a Kyrgyz-American, aged nineteen at the time, the surviving bomber, was tried under federal law in 2015, convicted of using a weapon of mass destruction and murder of a policeman, and sentenced to death. In July 2020 the US Circuit Court of Appeal overturned the death penalty in Tsarnaev's case. The Trump administration appealed to the US Supreme Court to reinstate the death penalty, and judgment was expected later in 2022. Massachusetts had abolished the death penalty in 1984.

### **The way ahead**

There is much to reflect upon.

Seeking security is understandable. Reacting to fear is another. But fear is a bad driver for public policy. We live in deeply troubling times. It is easy to understand why people in many countries are gripped by insecurity. The ready access to lethal weapons and mood-changing drugs and the risk of attack, from internal or imported terrorism, in schools, churches, mosques, heritage sites, public transport, shopping malls, and offices are horrors seen every day on television and the internet. As a defensive reaction, many citizens would like to see the return of retributive punishments. Desperation may push them to rely on subjective opinion rather than objective evidence.

We need to think deeply about how we define our humanity. In the final analysis, do we make judgments coolly and calmly on the basis of evidence that is capable of being weighed and objectively analysed? Or is it the case that, in dealing with human nature, objective analysis is useless and we are forced into terra incognita and must decide blindly, on the basis of instinct or gut reaction? We stand, I hope, against darkness, against obscurantism, against instinct, against pessimism about society and the capacity that individuals have for moral regeneration. Campaigners for abolition have to be prepared to argue for the tough cases, repulsive as they are: Julius Streicher, Adolf Eichmann, Saddam Hussein, Osama bin-Laden, Timothy McVeigh, Amrozi, John Wayne Gacy, Ted Bundy, Eric Cooke. The moral high ground does not allow campaigners to be selective.

A former archbishop of Paris, Cardinal François Marty, wrote:

If a man does no longer act like a man, the community must refrain from following him. Each time a human being is treated as a non-human being, then every human being is threatened. Any individual who commits an act of violence against another individual is degrading mankind. If we want to safeguard the concept of human beings now being threatened, we must resist the temptation of retributive anger. Can man, that imperfect being, be expected to render perfect justice? In that respect, could capital punishment give a notion of perfection to the justice of human beings?

State killing is not only brutal and destructive, but also pointless. In the world of an eye for an eye and a tooth for a tooth, we can all be blind and toothless, but it will not preserve our lives

or maintain our values. The evidence for abolition is compelling, as we face the challenges of violence, drug dependence, and jihadism. We cannot rely on an instinct for vengeance. As we fight against darkness, we need rationality, evidence, values, and compassion at the highest level.

If the senseless executions of Sukumaran and Chan in 2015 taught us anything, it is this: Australia must be much more active in advocating abolition of the death penalty internationally. This is not merely to protect and preserve its own nationals, but as part of a campaign with universal application, without picking and choosing, and with the moral force that earlier generations worked with to end slavery, liberate women, and eliminate torture and punishments for heresy or witchcraft.

### Professor Lidia Xynas

So many thanks to the Hon Dr. Barry Jones AC FAA.

Thank you so much. And now I'd like to invite up the Hon Michael Kirby AC, to give thanks and a response to the oration. Thank you, Michael.

### Hon Michael Kirby AC

Thank you very much Barry Jones for a wonderful oration and full of wise source and many excellent and new facts. You really are an amazing citizen of our country and your contribution to public discourse is quite unique. And unique for the values that you have been pronouncing upon for such a long time. But also unique for the detail, you are not a person for a light and frothy discussion of issues, you get into the detail.

And it's really wonderful and I'm most appreciative of you giving this oration in my name. Like the Dean, I acknowledge the Indigenous people, the First Nations people of our country. Most of the problems that arose from settlement were reinforced by and were implemented by or under the law. And it therefore specially behoves lawyers to be sensitive to that and judges and to use what my great professor of jurisprudence, Professor Julius Stone said. Using the leeways of choice that judges have inspired and encouraged in this state by the charter of rights and responsibilities, to bring justice where justice has been missing in the past. And with justice there must be economic recompense. It is not enough for us to simply acknowledge though that is a good thing. It is not enough for us to remember our wrongs, and that also is a good thing.

But if you deprive people of their land rights and other rights, you shouldn't be surprised that they, and their generations, and their descendants will be greatly disadvantaged in matters of education, health, welfare, housing, and so on. And so, at every occasion, we Australians should take a moment like the New Zealanders do. To pause and think about those early days and the wrong path that they lead to, which happily we are now in the process of changing, I hope we will get a voice.

I've often thought that the First Nations people talk in poetry, whereas we talk in prose. And their demand for a voice is not a demand as Mr Turnbull and otherwise highly intelligent and liberal minded person said a third chamber in our constitution that is far from what is being sought. What is being sought is a voice into our national and state parliaments and territory legislatures, that will sound the opinions of the Indigenous brothers and sisters. So, I was very glad to see that the Albanese government is going ahead with the voice and with other very important and puzzlingly delayed policies. But I want to thank Victoria University for continuing this lecture series.

What a wonderful oration series it is! I don't know any oration series in the nation, that is, has such magnificent speakers and who have brought really important points to this room. But the audience tonight is a special tribute to Barry Jones and to the knowledge that he won't just tread lightly on issues, he will give us A to Z, and that is what he has done tonight. Very soon after I was appointed to be a deputy president of the arbitration commission, I was in Shepperton, a very beautiful rural city of this state. And it happened that the Supreme Court was sitting there and two judges, one and already quite old judge,

Murray McInerney, later, Sir Murray McInerney and a very young, freshly minted Michael Kirby were there and we agreed to meet in the park at Shepperton. And that was unusual because shall I say, and I'll try to say this as delicately as possible. My appointment had not been generally welcomed by the judiciary and the government in Victoria, but I won't go into that, that would be too much detail. So Murray and I, just had a sandwich in the park there. And the conversation came around to his early life at the bar, because that can always be a source of really interesting contrast and comparison to your own life. And he began to tell me the story of a dock brief that he had received in the very early stages of his life, the bar.

A dock brief was a kind of legal aid on the cheap, it involved a young barrister or lawyer going to the court and being handed a brief, which he, and in those days, it was usually a he, would take up and pursue. And he told me that one of the earliest cases he had as a very inexperienced and immature barrister, was a capital case.

And as the Premier and Barry Jones have said, in those days, this was not a theoretical matter in Victoria. And so, Murray, I could see was rather upset, and he began to talk about his experience. And he began to talk about the stress and pressure that was put on young lawyers receiving a dock brief in a murder case or in another capital case.

And suddenly, I saw that this, what I thought was a very old man, he was actually much younger than I am now. And he was weeping and the tears flowed down his cheeks and I felt very distressed. He was actually remembering those feelings from the times decades earlier that he had been handed a dock brief, and he said I didn't do very well, I don't think he'd lost his life because I was his barrister, but I didn't do well and it's haunted me ever since.

So, there is a tale from inside the purple curtain, it's a tale of how being involved in criminal cases that may and often did lead to execution had an impact not only on the victim and not only on the judge and maybe the jury, but also upon the lawyers who are involved. And this is a point that has been made elsewhere by Stephen Keim, and I'm very glad he is here.

He's a wonderful barrister in Queensland and I said to him, you know you should be appointed to the High court of Australia. But he told me he'd almost reached his used by date, which is a tragedy that we miss out on a man of that quality and with those values.

So, these were the days, and Barry Jones stood up and he became a leader, and he was critical to getting the necessary votes that abolished it in the last state in Australia that continued to execute people.

So, it was not only on the books, it was carried out, and it had become a kind of symbol and a challenge, a mental challenge for Sir Henry Bolte, but it was also, let us be frank. It was a policy that was popular in many quarters and it needed an advocate and a politician, and a thinker who would know about and not too many people who knew about the long history, but Barry Jones not only knew about it, but he then began speaking about it.

He spoke about it endlessly. He drove people mad speaking about it. And he wrote this book which is on sale outside. There's no point coming here not buying the book, because as he's pointed out in this oration, it's not only a story of the struggle in Australia, but it's the struggle internationally. You might say, well, what's the real relevance of this given that every state and the commonwealth have abolished capital punishment?

Well, the relevance of it is, it's a microcosm of the history of the law and of the fact that we can change the law, and we can remove the injustices and that we must be concerned to do that, and we mustn't leave it to others and we must do it ourselves. So, I thought it was a wonderful oration, and it's up there with the best and I'm very glad that the university continues the tradition.

I thought that the new building, which I had never seen before is a magnificent addition to the campus of Victoria University, I'm very proud myself to be an alumnus, and I'm very proud to come frequently to the School of Law and Justice. I like that extra bit. It's not just a law school, it's a school of law and justice, and this occasion is one that is special. But it's not the only book Barry Jones has written.

As you know, he's written a biography, *A Thinking Reed*. He's also written a most influential bestseller, *Sleepers, Wake!* and it was a real shakeup as was his writing on climate change. So, he's really been an amazing thorn under the saddle of our polity.

But another book that he's written is the *Dictionary of World Biography*, and I have it on the shelf behind me at work, and often when I should be concentrating on tasks at hand, I start reading it, because it's tremendously fascinating versions of very interesting and important lives. But it's also very amusing because in the forward to it he recounts the trouble he had with getting it published by Penguin.

And it's a hilarious story of the battles between Barry Jones and the publishers, he started the exercise and this is typical of the man that we've seen tonight and heard tonight.

He started when he was working in the land titles office which is just next door. And he was there with John Button and other famous Victorians. They got a lot of good training, but Barry started his exercise in taxonomy. There is only one taxonomist greater than Barry Jones, and that was Alfred Kinsey, who was originally a taxonomist of bees, wasps and turned from that to a taxonomist of human sexuality. And I was in Bloomington just a week or so ago where they made a bronze image of Alfred Kinsey. I think it would be a good thing if the grateful people of Victoria, and if this university could contribute to a bronze image of Barry Jones.

It would be good if it could have the marvelous features that are captured in this painting. Stephen Keim put the painting up for sale with the permission of the owner in Brisbane on the very day, 100 years after the Labor government in Queensland had piloted through the Queensland Parliament, the first statute for the abolition of capital punishment anywhere in the British empire. And that was a really important first step, and it only happened because a few people with knowledge became advocates for change. At the beginning of the book, he mentions rather than melancholy I think, that looking back on his life, there was only one person he could say who was in public life at the time he joined public life in 1973. And that person was her majesty, Queen Elizabeth. And that reminds us that Barry Jones in two weeks' time or three weeks' time reaches his 90th year. But I expect like the Queen, that he will just go on and serving, he'll be working a day before he is called by the heavenly gates. He'll still be working, he'll still be a taxonomist.

He'll still be trying to think through and puzzle through some new change, nuclear weapon control is the great challenge of our species. And it would be a good thing if he could turn his very considerable intellect and enormous knowledge to that topic. But whatever he does, it will be perfectly accomplished.

So Barry, we're going to have some questions, but not too many. And then a few of us are going to dinner with you to raise a glass to a really great Australian, and a great intellect, and an internationalist and a reformist.

And that has been the feature of the orations, and I'm very proud that they continue. And so long as they continue and I continue, I will be here to welcome them and to praise the orator, as I now praise Barry Jones.

### Professor Lidia Xynas

So, we'll just take just a few questions. So, any questions there? Stephen, how are you Stephen? Come, just make your way across.

#### Speaker 1

My question is, does the death penalty still exist in Australia by the Commonwealth in the states for treason, and with treason, including either imagining or inflicting death on the sovereign or the here to the sovereign?

#### Hon. Dr Barry Jones AC

Well, the death penalty legislation that was carried by the Whitlam government in in 1973 was abolished for all crimes, including treason. Funny thing is that there's been a number of states, Ireland is a good example where you had the death penalty for civil crimes abolished at an early stage but they didn't deal with treason at all. You might say that's been wonderfully successful as a deterrent because no one's ever been prosecuted under it.

So, I should add that in fact, the very last instance of death penalty was in Michael Kirby's own state of New South Wales where by sheer inadvertence, when they abolished the death penalty, they abolished it for murder, but forgot that there are other crimes and I think it's still applicable for piracy, which doesn't happen all that much. Piracy and I think stealing lead from church roofs. And it was one of those, oops, moments where they said, we didn't realise we've left it in the statute book and nobody ever thought about it because nobody ever raised the question of stealing lead from church roofs as you tend not see it too often.

#### Speaker 2

First of all, thank you to both gentlemen for your talks tonight, Michael, you'd be pleased to know, I come from Shepperton. So, my question relates to migration law. One of the biggest problems with migration law is the character provision in migration law and it is impossible for somebody who has had a death sentence in another country to pass a character test. So how does this fit in with our move to abolish the death penalty in international countries?

#### Hon. Dr Barry Jones AC

Might be better to ask Gareth, he's got a view on that. But that's a very thoughtful issue. I must confess, I haven't really thought about that. I'll seek our secret learned counsel's advice. I'm sure Gareth could come up with something better than me.

But it's a very, that's a very worthwhile point. I can understand where somebody might, you know, perhaps have been framed in another country and subject to a penalty. They then manage to escape and get here. We'll have to think about that.

### **Speaker 3**

Thanks Barry. Thanks for a good address.

Look, can you explain the paradox for me that particularly in America, the most enthusiastic supporters of the death penalty, the most enthusiastic anti-abortion people and vice versa, the most enthusiastic, anti-hanging, anti-death penalty people seem to be the prochoice people. Can you understand that?

### **Hon. Dr Barry Jones AC**

Look, I think it's beyond human reasoning, but it certainly is true that there's a correlation between the strength of support for the death penalty state-imposed execution. But on the other hand, the denial of the right of a woman to be able to choose, you know, what's happened in her in her own life.

It's difficult to see how it's going to change. I was very struck by something in a very interesting article in the Economist last week, I think it was in the Lexington column, where they're making the point that in the United States, 37 of the 50 states are now one-party states. You see, you've got 37 states where the possibility of the other party winning is so remote, and so unlikely, don't even think about. So, the chances of the republicans winning in California are zero, the chances of democrats winning in in Florida probably zero.

And so, what then happens is that political decisions are made, not on the basis of what the general community thinks, but on what the members of the dominant political party, the actual branch members paid up members think. They make the big decisions. In the end, you can see that with the application of gerrymandering, it means that if you've got a group which gets the support, say, of the religious fundamentalists, they get them to stack the local primary process and so on. That's more important than the final vote when the whole electorate comes out, who gets that nomination or what we call an Australia preselection. It is it is absolutely bizarre.

It's extraordinary to find the correlation between the role of the of the gun lobby and their reaction to multiple killings, to mass killings by the use of guns. And they say, well, we've got to have the guns. And, well, it's probably a mental health issue if people commit these crimes, so it's nothing to do with the guns.

But in a way, it is one of the reasons the Americans put an emphasis on American exceptionalism, why they won't join the International Criminal Court, for example, they just don't want to be part of it. They have their own way of doing it and its state by state by state, it's utterly different. And that's a matter of grave concern. I don't see that changing. There's the prospect I would think with the midterm elections coming up. While the general feeling now is that the democrats will retain the Senate and might even gain a seat or two, you know, the probability is that the democrats will lose the House of Representatives, perhaps not by much, but they'll lose it. And that means you're going to have in effect a hung legislature. And it means that there's a danger of Biden appearing to be a lame duck president in those last two years.



**Professor Lidia Xynas**

Thank you so much Barry. And if I could call up the Honourable Steve Bracks AC to provide the closing comments and to close the oration.

**Hon. Steve Bracks AC**

Well, could I add my thanks to that of Michael Kirby and to Barry Jones for an excellent oration? Quite telling, as Michael said, very detailed and quite revealing in lots of ways. You know, under the cover of War in the Second World War, Papuans were executed by our own forces is quite disturbing when the narrative that they wanted to give was of the Papuans actually supporting our war effort more broadly and being eulogised.

So, it's quite revealing and, you know, and quite telling, Barry. Of course, as always, a great speech, great oration. Well prepared. Well researched and we understand the sort of work that went into that and I was amused to see you whilst you were delivering your speech that you're correcting it on the way. And that tells me something because I know when my wife Terry worked for you in your electorate office regularly, speeches wouldn't be a regular, not a static thing and they'd be pulled out of the file and they'd be regularly updated and regularly corrected and that would be going on and on. And I could see that that is still happening now with, with your speech as well.

And it's a great thing. We'll, we'll take on notice the call from Michael Kirby to have a bronze statue in the forecourt of the Victoria University building or in the forecourt of the state records office or the land titles office. But it would be certainly appropriate what you know, who is quite rightly a living treasure. Someone who has given so much to Australia more broadly, someone who has achieved so much and someone who presented this oration, with great ability, skill and great rationality, and so to Barry Jones, thank you very much for delivering the 11th oration of the Michael Kirby oration. So, thank you very much.

And to Michael Kirby again, thank you for allowing us to have an oration in your name and your response was second to none and we appreciate enormously the work you're doing with Victoria University and our Law and Justice School, I should say. And we are greatly appreciative of all the work that you've done for the university. So, thank you very much also.

And so, it just leaves with me, to officially thank everyone for being here and to officially close the 11th Michael Kirby Justice oration for 2022.

And thank you all for your involvement here today. Thank you.