Justice by the numbers: the administration of capital punishment in Japan

Though there is little debate about the death penalty, court cases attract huge media interest, says **HUGH SELBY**

THE KOKURA Court House in northern Kyushu, Japan, is a modern, spacious, well-appointed building. The ground floor facilities for visitors are comfortable and attractive. Upstairs, on the courtrooms floor, the waiting areas look on to a tranquil inner garden. As a recent frequent visitor, I have been struck by the quiet, pleasant atmosphere of the place.

One day in September, all that changed. A couple had killed and then dismembered a number of relatives, both adults and children. Arrested in 2002, they were now to be sentenced, and it was expected that they would hang. There is little debate about the death penalty in Japan. Single homicides are unlikely to lead to the noose, multiple homicides will stretch the rope. Condemned prisoners can stay on death row for years as their appeals process is exhausted. However, when at last the deed is done, it rarely attracts attention.

I came to court that day in the hope of seeing how Japanese judges sentence the end of life. There is no death penalty in Australia so no Australian judge must declare that another human's life is to end arbitrarily and deliberately. Whether one is a supporter or an opponent of the death penalty, there must be an expectation that its imposition will be surrounded by solemnity and seriousness.

I expected that others would come to see the sentence imposed, including any remaining relatives or close friends of the deceased, and perhaps some direhard opponents of capital punishment. So it was surprising to arrive at court and find the building chock-a-block. The court staff clearly knew what would happen because they had worked long and hard to remove all the furniture in the waiting areas and corridors. There were hundreds of people (mostly young) milling around outside the building, lined up in multiple rows down the long, straight corridors, and forming platoon formations in the waiting areas.

Arm-banded officials yelled instructions and used long arm gestures to control the crowds. Outside, the media trucks fed black cable in all directions, while well dressed, photogenic reporters gushed with the trivia which passes for news.

Right on schedule, the doors closed. No more would be allowed to take part in the ballot. Each person received a sequentially numbered card. They went from one to 738. A lap top computer sitting atop the only remaining piece of furniture — a small table outside the courtroom — whirred and produced the lucky numbers for the mere 34 spaces inside the courtroom. The unsuccessful 704 then had to leave. They poured down the stairs, across the vestibules and out through the doors.

What does one make of such seeming strong interest by Japan's under-25s in a capital sentencing? With so little debate about the death penalty, it was surprising that so many turned up. Given that hundreds of people were clearly expected by the court staff, why was the official response so absurdly out of date?

Their only concession to the last half century was to replace individual ballot chopsticks with the computer. Why was there no plasma screen downstairs, or outside, so that the interested public could see the sentence and the reasons being delivered? Why was there no promotion of a website where interested people could instantly find the sentence and the reasons for it?

The Japanese Constitution requires (Article 82) that trials shall be conducted and judgment declared publicly. The interpretation of this provision seems to be bound in some pre-electronic age time warp. The judges, who use every modern contrivance to travel, research, write and relax, then pretend that none of it exists when it is time to declare their judgment publicly. Instead, the media and the waiting community is indulged to the trifling extent that only a still shot of the judges in court is permitted on television. Thereafter, the media must rely on hand-drawn images. Japan is not alone in this — judicial blindness, or is it timidity? — crosses nations, race and gender.

The extent of public interest was clearly demonstrated in the television, radio and newspaper reports over the next 24 hours. The sensational crimes were described anew, the complex relationship between the two killers was again the subject of intense speculation, the interesting twist that each attempted the mantle of a victim manipulated by the other was repeated, and then came the not unsurprising news that he had appealed. She, for the moment, remained mute. All of this was news.

And therein lies the rub. Perhaps a relative or two or three of the victims was quietly ushered into court. That would be usual enough, save that in this case it was close family members who were the victims. Those 700-plus young people were not there to support or oppose the penalty or the reasons given. They streamed out of the building with nary a thought for what went on in that upstairs courtroom.

The winners handed over their precious seat passes to waiting media. Winners and losers alike, each and every one of them, then took their money. They were feet and hands for hire, ticket numbers hired by the media for the news advantage of being inside, rather than outside the courtroom.

This was a different sort of chequebook journalism. Some 700 people were each paid about 3000 yen (about $A35) — that's enough to see three first-release films at the student rate. The media budget to get first grab at that news was thus around two million yen.

I walked away from the courthouse that morning bemused. I thought of the crowds that gathered at Western executions before they were removed out of sight. I thought of the crowds that still gather in those parts of the world where executions and maiming are still publicly performed. I speculated that if Japanese executions were public then there would be the same demeaning ballot, with young people chattering about pop songs, love and sport as they earned a bit of cash by helping the media to vie for front row seats.

Going home, a desperately poor waif ran past me. At the monorail, a father and his four sons were just along the platform,eating battered sausages on a stick. The smallest boy, about seven years old, must have missed or ignored some paternal remark. Down came the arm and fleshy hand, whacking the child heavily across the head and cheek. He was stoic. Tears streamed down his face but no sound came. His siblings looked elsewhere, the kind of reaction born of repetition. Poverty and familial violence — so often associated with crime — these don't figure in pictures of Japan, but they were right in front of me, just as the morning's court absurdity had been.

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A betrayal of the values of democracy

In its present form, the anti-terrorism bill would sit easily in a totalitarian state, says **GREG CARNE**

WITH the tabling next Tuesday (Melbourne Cup Day) of the Anti-Terrorism Bill 2005, federal Parliament faces some stark choices. Counter-terrorism legislation ought to be carefully crafted to reinforce freedoms, promote confidence in the police and security services and build trust in Muslim communities. However, this Bill betrays and endangers the values of Australian democracy, and its arbitrary characteristics might well serve the long-term objectives of terrorists, including the alienation of Muslim youth.

There are remarkable deficiencies in this Bill — illusory and executive-contingent ''safeguards'', loose discretions, vague language, and a vast legislative reach. The two-day detention in the Bill provides a platform for extended 14-day state and territory-enacted detention. This is a contentious attempt to skirt around Commonwealth Constitution restrictions on detention by Commonwealth officials, established by the High Court.

The Bill provides for control orders, providing a range of individual restrictions and obligations up to house arrest, and preventive detention orders, enabling the AFP to take a person into custody, other than for investigation and charge, before or after a terrorist act. Such detention is a third form of detention, additional to Crimes Act and ASIO Act detention.

Context matters in terrorism laws. Detailed comparison of the Australian Bill with British laws demonstrates the Bill's significantly inferior ''safeguards'' and a truncated legislative debate.

Since the July London bombings, the 2005 UK Terrorism Bill was available for public debate a month before introduction to Parliament, and was critically reported on by the Independent Reviewer, Lord Carlile, QC.

British detention, though partly preventive, unlike that proposed by Australian Bill, remains firmly within a criminal law investigation and charge model. The more significant British safeguards over control orders and detention respond to the UK Human Rights Act and access to the European Court of Human Rights.

The Australian Bill establishes parallel AFP preventive detention to the ASIO preventive, intelligence-gathering detention. Attorney-General Philip Ruddock has previously observed that the 2003 ASIO legislation, with safeguards constructed by Parliamentary reports and Senate compromise, might have produced legislation too checked, an outcome possibly third or fourth best. The 2005 Bill throws out higher thresholds for authorising detention, independent authorities present to monitor detainee treatment, and severely restricts access to legal representation. Unlike the ASIO legislation, it omits independent review. Its sunset clause is set at an ineffectual 10, instead of three, years.

Have the Attorney-General's backbench committee, and, if permitted a hearing, the Senate Legal and Constitutional Committee, the substance to force amendments? Radical surgery is needed to include real safeguards, aligning counter-terrorism objectives with rule-of-law standards. What practical and achievable measures should the committees demand?

The Bill effectively restricts judicial review of control orders and preventive detention to narrow legal questions, the court being unable to conduct a proper merits review of factual material. The ex parte control orders process is an inadequate procedure for the issuing court to test the AFP claim.

Special Advocates, security-cleared counsel from the independent bar — as in Britain under other legislation — should be appointed to assist the court's testing that claim. An initial control order should be subject to confirmation at a full hearing, including an opportunity for the control order subject to contest the issue and terms of the order. Likewise, full judicial review — using Special Advocates if needed — should be available for preventive detention orders.

The Bill includes no requirement to periodically review its operation. An independent reviewer should be appointed, after the British legislation, to conduct annual operational reviews. More extensive review should occur every five years by the expert panel recently appointed for the 2002 security legislation review, supplemented by a Muslim communities representative.

A sunset clause at 10 years is meaningless. A sunset clause should act as a brake on improper executive application, creating a pause for corrective action. The sunset clause should be reduced to five years.

The Bill's drafting avoids real ministerial input in a consent process that, before an application, control orders or preventive detention orders sought must satisfy rigorous criteria.

The Attorney-General's actions under the Bill will therefore comport with Prime Minister John Howard's ministerial responsibility doctrine, ie, a minister is only responsible, if ever, for the most direct actions. The Palmer and Comrie detention and deportation reports render that approach unsustainable. The Bill should be amended to ensure proper political accountability.

The initial preventive detention order, of up to 24 hours' duration, is issued by a senior AFP officer. That AFP officer can also issue a prohibited contact order, to ''assist in achieving the objectives of the preventive detention order'' — a low threshold for prohibiting all contact, except with the Commonwealth Ombudsman.

AFP officers are likely to simultaneously apply for both orders, ensuring incommunicado detention. This completely lacks independence and rigour. Like the Canadian model, only judicial officers should warrant preventive arrest, save in emergency circumstances, where an AFP preventive arrest is immediately reviewable by a judicial authority.

''Contact'' of a detainee — by phone, fax or e-mail only — with a lawyer is restricted to the narrow purposes of bringing proceedings in a federal court regarding the preventive detention order, or making a complaint to the Commonwealth Ombudsman. General legislative advice and monitoring the welfare of the detainee through a lawyer's presence is prohibited. Virtual ''contact'' of lawyers can be further curtailed or eliminated by the issue of a prohibited contact order, as mentioned above. These severe restrictions on legal representation will frustrate access to the courts and constitutional and tortious challenges to detention.

British and French detention case experience before the European Court of Human Rights demonstrates that the exclusion of physical presence and access of lawyers to detainees produces a serious human rights violation culture. Amendment is required to guarantee actual presence of lawyers for detainees as a real safeguard against human rights abuses.

Unlike the ASIO detention provisions, no protocol exists for the treatment of detainees, rendering its guarantee of humane treatment questionable. A statement of procedures and standards, subject to penalties for breach, should be included.

The incommunicado detention is further compounded as the ASIO legislation safeguards of the physical presence of the Inspector General of Intelligence and Security and a retired judge are missing. A greatly enhanced Ombudsman role, mirroring the IGIS role in ASIO detention, should be included.

The Ombudsman should be immediately notified of detention draft requests, detention orders, detention location and release from detention, subject to a penalty of failure to notify. The Ombudsman should have a legislated right to be present at any stage of arrest and detention. A random, sample Ombudsman monitoring through visits to detainees, should be included. Simply expressed, the Bill is a shocker. It is a damning commentary on Australian democracy that political and legal processes to ensure rule-of-law values, routine in Britain, are seen here as unconscionable.

Next Tuesday, the popping of champagne corks will either celebrate a commitment to an Australian rule of law after the Bill's extensive amendment, or as Justice Sir Frank Kitto, of the High Court, said in the Communist Party case, leaves the nation ''wide open to a totalitarian state''.

Greg Carne is an academic lawyer

It's time to run the rule over federal advertising

By Andrew Leigh

PERHAPS the Federal Government has done us all a favour. By spending almost a million dollars a day on television, radio and print advertisements to tell us why it doesn't like the present industrial relations system, it may have finally prompted a rethink of all government advertising.

From an economic perspective, there's an easy way to judge whether a government advertising campaign is good policy. If the benefits don't exceed the costs, it should be scrapped.

With the WorkChoices campaign, the exercise is trivially simple. Since the Coalition has a majority in both Houses, the laws will be coming into force within months. So whatever you think of the merits of the industrial relations reforms, the societal benefit of the advertisements themselves is zero.

As High Court Justice Michael McHugh noted last week, ''I can see no connection — rational or otherwise — between these advertisements and higher productivity and higher wages.''

For just this reason, the United States bans advertisements like the WorkChoices campaign, by preventing the use of public funds ''for publicity or propaganda purposes'', or ''to favour or oppose, by vote or otherwise, any legislation or appropriation by Congress''.

You don't have to be partisan to see this as a sensible restriction on government expenditure, though Australia's conservative think tanks have been suspiciously silent over their attitude to the WorkChoices advertisements.

But what is less often recognised is that most other government advertising campaigns would probably also fail a cost-benefit test. While many have criticised the WorkChoices advertisements, it is merely the latest of a series of campaigns whose public benefits are dubious at best. In 2004, for example, the Federal Government devoted $16 million to a pre-election campaign telling Australians that they were ''strengthening Medicare'', and $5 million to advertisements informing people that superannuation contributions would now be treated more generously.

According to figures compiled by the Parliamentary Library, the Howard Government has spent an average of $122 million a year (in today's dollars) on government advertising since it came to power in 1996.

And Labor was far from pure — real government advertising expenditure averaged $86 million dollars a year under the Keating government.

Plenty of other government advertising campaigns would also fail a robust cost benefit test. Did the $6 million Regional Telecommunications Campaign bring $6 million of public benefit? Probably not. How about the $26 million Pharmaceutical Benefits Campaign? Unlikely.

Even in the case of the $8 million a year spent on defence recruitment, it is difficult to know whether taxpayers are getting value for money, or whether the Government is using its recruitment campaigns partly as cover to tell the rest of us what a terrific military it presides over. Another $8 million in signing-on bonuses for new recruits might well be a better way to attract more soldiers.

The trouble is that government advertising campaigns are almost never subjected to rigorous evaluations. Past reports by the Audit Office have noted the lack of protocols on government advertising, and the propensity for government advertising to increase sharply before an election is called.

As Melbourne University's Sally Young has pointed out, this gives a substantial advantage to the incumbent party. In the 2004 federal election campaign, the parties together spent about $40 million on party-political advertising — less than half the $95 million spent on Federal Government advertising in the lead-up to the poll.

With the Federal Government's advertising spending now out of control, perhaps the time has come to take a different approach. In general, the Federal Government does not need to advertise. Major policy changes are reported in the media, and even jobs and tenders can be advertised in the *Government Gazette*.

If the Government really believes that an advertising campaign meets the cost-benefit test, it should be willing to submit it for scrutiny by an independent body, such as the Productivity Commission. Few campaigns would pass, and taxpayers would be the better for it.

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While cattlemen are protected, alpine wildlife goes begging

By Rosslyn Beeby

DURING a television interview, documentary film-maker Sir David Attenborough was asked to name the world's toughest conservation battles. ''The ones closest to home,'' he replied.

It was too easy to focus on ''offshore conservation'', he explained, dispatching donations to save African elephants while ignoring the impact of a new freeway or housing development on local wildlife.

Ditto with climate change. It's easier to fret about the fate of Arctic polar bears than the demise of a chunky alpine rodent that's found just a few hours' drive from Canberra.

Earlier this week, alpine ecologist Dr Ken Green told a University of Canberra public seminar that climate change was already affecting alpine wildlife in Kosciuszko National Park. Data gathered over 30 years showed birds were migrating into the mountains earlier as each decade passed.

Dr Green, founder of the Australian Institute of Alpine Studies, said populations of the broad-toothed rat had crashed by 80 per cent after the earliest spring thaw on record, in 1999. Six years later, populations have not recovered.

''We could lose them just like that,'' he said. Does anybody care? The Federal Government has proposed a $15 million conservation and heritage package for the Australian Alps which promises to fast-track CSIRO research on satellite-controlled cattle collars to allow mountain cattlemen to continue alpine grazing. It allocates $100,000 to create a ''life-size cattle drive diorama'' but commits no funds to wildlife research.

Such is the cash-starved state of Australia's wildlife research, that it's not surprising to learn that little is known about the broad-toothed rat, a high country herbivore. The rat lives in high-rainfall heathland — a region so dank that the rat's thick fur has a green algal tinge. It builds large nests of shredded grass and an intricate network of runways under dense alpine groundcover, which enable it to move around under the snow in winter.

PIN-UP: The broad-toothed rat (*Mastacomys fuscus*).

If you saw such such a runway-building beastie on a wildlife documentary about the Siberian tundra or Europe's alpine meadows, you'd be charmed and motivated to help save its faraway habitat.

You'd be proud to wear a ''Bat for the Rat'' T-shirt to proclaim commitment to mitigating climate change. But Kosciuszko National Park is just up the road, and familiarity breeds ecological apathy.

You may naively think Australia's environmental lobby groups will beat a path to Dr Green's door, now the rat's plight has been revealed.

Climate change is a keenly contested battleground for Australia's environmental lobby groups — but it's a battle that's primarily a membership drive rather than a serious tilt at political resolution. The rat won't cut it at as a fund-raising icon at the weekly marketing meeting.

It will be business as usual with regard to global warming for these environmental frequent flyers.

At a recent national climate change conference in Canberra, three of Australia's peak green lobby groups had fielded nine delegates. None were presenting papers, but were attending as ''observers''. All had jetted in from interstate. How's that for a Doc Marten-sized ecological footprint — particularly when conference papers could be ''observed'' online.

Meanwhile Australia's hard-working wildlife scientists are forced to fund important research from their own pockets.

Dr Green casually mentioned to his audience that initially he couldn't get government funding for a long-term climate change monitoring project in the Australian Alps.

''But I thought it was an important thing to do, so I went ahead and did it in my own time. You can't muck about with something as important as climate change.'' Well said.

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