

## "Capital Punishment"

### The Hon IDF Callinan AC, Justice of the High Court of Australia

In the past, almost every tribe or nation routinely imposed and carried out the death penalty, and not infrequently for trivial offences. Throughout the world numerous countries have expunged capital punishment from their statute books. But the fact that many countries of different cultures and having different forms of government retain it might suggest that a case for its retention in some circumstances can reasonably be argued.

It will be appreciated that as Australia is a federation, and even though the central government has validly enacted a Crimes Act and a Sentencing Act, as crime is essentially local, and a matter for correction and punishment by State governments, it has been largely (but not exclusively as will appear) for them to mandate or abolish the death penalty. All of them have in fact done so and there have been no serious attempts to reintroduce it. The last State to do so was New South Wales in 1985; although the last person to be actually executed in controversial circumstances, was Ronald Ryan in Victoria in 1967. Although it is not currently an item so far as I am aware on any state or national political agenda, there is recurrent public debate about it. It continues to occupy space in newspaper columns, letters to the editor and editorials<sup>1</sup>, as well as pervading the air waves on talk back radio. So long as mindlessly tragic acts of violence such as the Port Arthur shootings in which 35 innocent men, women and children were murdered, and the Bali bombing continue to be perpetrated, the

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<sup>1</sup> See, for example, M Hedge, "A Sentence Only Slowly Dying" *Western Australian* (16 August 2003) at 55; C Pearson, "Justice: Absolute or Diluted" *Weekend Australian* (16 August 2003) at 22; A Bolt, "Amrozi Taps Anger" *Herald Sun* (11 August 2003) at 19.

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issue of capital punishment, and the question whether it should be reintroduced in Australia, will not go away.

Let me make my personal position clear at the outset. I am opposed to capital punishment. The literature on the topic is vast and the arguments for and against it have been recorded on many other occasions. I will, however, touch upon the reason against capital punishment that I think most compelling. It can be simply stated. The criminal justice system is fallible and capital punishment as a result of it is irreversible. That is not to say that I think other arguments against it not persuasive. They need not however be repeated today.

### Capital punishment in Australia

Something should be said about the relatively recent history of capital punishment. In England in 1765, there were more than 160 offences for which capital punishment was the prescribed penalty<sup>2</sup>. As the English criminal justice system was reproduced within the Australian colonies, capital punishment was available and prescribed for a wide variety of offences from the earliest years of settlement. During the nineteenth century as many as 80 persons were hanged in the colonies of Australia per year for crimes ranging from burglary, sheep stealing, forgery, sexual assaults, murder and manslaughter to even, in one case, "being illegally at large"<sup>3</sup>. It has been estimated that 1648 persons have been legally executed

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2 Sir William Blackstone, speech published in "Opinion of Different Authors on the Punishment of Death", vol 1 (1809) at 17.

3 Potas, I and Walker J, "Capital Punishment", published by the Australian Institute of Criminology, February 1987 at 1.

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in Australia<sup>4</sup>. In the 103 years since Federation, the number has averaged barely one a year, but of course that period covers the years after the abolition of the penalty in the various states.

In 1922, this state, Queensland was the first state in Australia to abolish the death penalty by legislation<sup>5</sup>. The last person to be executed in Queensland was Ernest Austin. He had been hanged at Brisbane Gaol nine years earlier for the rape and murder of a 12 years old girl<sup>6</sup>. The only woman hanged in Queensland was Ellen Thompson. She was executed with her lover, John Harrison, at Brisbane Gaol on 13 June 1887 for the murder of her husband at Port Douglas. A Brisbane newspaper described her as a "pitifully wicked woman" and gave an account of the hanging. The journalist wrote that "in every man's mind was the notion that whether the death penalty be right or not, hanging is a barbarous and a brutal thing"<sup>7</sup>. After the executions, so-called phrenological examinations were performed which were claimed to reveal "in the woman combativeness and destructiveness ... both large, the domestic affections ... fairly full, the moral propensities small, and the sexual love amativeness, exceedingly large. A similar examination was performed on Harrison. The same newspaper reported that "Judging from this, it would seem that the woman was the moving spirit in the plot, and that her passion for Harrison inspired her. She was active,

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4 Australian Coalition Against Death Penalty;  
[www.angelfire.com/stars/dorina/historycp.html](http://www.angelfire.com/stars/dorina/historycp.html)

5 *Criminal Code Amendment Act 1922 (Q)*.

6 Australian Coalition Against Death Penalty;  
[www.angelfire.com/stars/dorina/historycp.html](http://www.angelfire.com/stars/dorina/historycp.html)

7 *Brisbane Courier*, Tuesday 14 June 1887.

#### 4.

cunning and masterful ... Harrison, on the contrary, cared for nothing but himself, and wanted Old Thompson's [the victim's] money far more than he did old Thompson's wife."<sup>8</sup>

Tasmania was the first to follow Queensland's lead, but not for 46 years<sup>9</sup>, then the Commonwealth in 1973<sup>10</sup>, and the Northern Territory<sup>11</sup> in the same year. Victoria followed suit in 1975<sup>12</sup> as did South Australia in 1976<sup>13</sup>, the Australian Capital Territory in 1983<sup>14</sup> and Western Australia in 1984<sup>15</sup>. New South Wales, the last, did not remove capital punishment from its statute books until 1985<sup>16</sup>.

In practice as is apparent, there was a significant gap between legislative abolition and actual utilization of the death penalty. For example, despite the delay in New South Wales in formally abolishing the penalty, no one was executed in that State after 1939. A sentence of life imprisonment is now the most severe sanction authorised by the Australian law of any jurisdiction.

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8 *Brisbane Courier*, Tuesday 14 June 1887.

9 *Criminal Code Act* 1968 (Tas).

10 *Death Penalty Abolition Act* 1973 (Cth).

11 *Criminal Law Consolidation Ordinance* 1973 (NT).

12 *Crimes (Capital Offences) Act* 1975 (Vic).

13 *Statutes Amendment (Capital Punishment Abolition) Act* 1976 (SA).

14 *Crimes (Amendment) Ordinance* 1983 (ACT).

15 *Acts Amendment (Abolition of Capital Punishment) Act* 1984 (WA).

16 While it had been abolished for all crimes except for treason and piracy by the *Crimes (Amendment) Act* 1955 (NSW), it was finally abolished for treason and piracy by the *Crimes (Death Penalty Abolition) Amendment Act* 1985 (NSW) and the *Miscellaneous Acts (Death Penalty Abolition) Amendment Act* 1985 (NSW).

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In part at last, because Ryan's case was not only the last case in which the penalty was imposed but also because it was the first occasion for many years in this country of its imposition and execution, it then and now excited and excites interest.

On 19 December 1965, Ronald Ryan and another prisoner, Peter Walker escaped from Pentridge Prison with almost unbelievable ease<sup>17</sup>. There was no warder on duty at the time. Ryan took a rifle from a guard-post and during the escape shot a prison guard. The pair remained at large in Melbourne for some days, and robbed a suburban bank on the day of the prison guard's funeral. There was widespread fear in Melbourne around Christmas 1965, especially after a truck driver, who had been an associate of the escapees, was found shot dead, in a St Kilda public lavatory. Ryan and Walker were eventually recaptured in Sydney in January 1966. The pair were jointly tried for murder by Justice Starke and a jury in the Supreme Court of Victoria. Ryan's defence counsel, Mr Philip Opas QC, pointed to a number of inconsistencies in the prosecution case. The prison guard was a much taller man than Ryan and was standing only a few yards away from him when he was shot. The downward trajectory of the bullet however suggested that the prison guard had been shot from a height or from a considerable distance. Most witnesses had only heard one shot. One of the guards, who had tried to prevent Ryan and Walker from escaping, admitted having fired a shot in the general direction of Ryan and prison guard, although he said that he lifted his rifle towards the sky at the last moment. A Melbourne newspaper reported a penal official as saying a shot had been fired from the observation tower of the gaol. The fatal bullet and its cartridge case were never recovered.

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<sup>17</sup> See Jones B (ed), *The Penalty is Death: Capital Punishment in the Twentieth Century*, Sun Books (1968) at 265-270.

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The jury convicted Ryan of murder and sentenced him to death. Walker was convicted of manslaughter. Ryan appealed unsuccessfully to the Full Supreme Court and the High Court. State Cabinet confirmed Ryan's death sentence on 12 December 1966. An appeal to the Privy Council on 23 January 1967 was unsuccessful and Ryan was hanged at 8am on Friday 3 February 1967.

### The High Court and Capital Punishment

Since its establishment in 1903, the High Court has heard numerous appeals by persons convicted of murder and sentenced to death. In contrast with the multiplicity of cases concerning the death penalty decided by the United States Supreme Court over the last thirty years, and in respect of which I will say more later, none of the appeals to the High Court sought to challenge the constitutional validity of the death penalty. This is explained by the absence of a Bill of Rights in Australia, and perhaps by the fact that those cases were heard and decided before the recent trend by counsel before the Court to seek to invoke court procedures and remedies to safeguard civil and political rights derived from writings and decisions in other jurisdictions.

Justice Kirby, has referred to a number of the relevant High Court cases in an article published in the Australian Law Journal in 2003<sup>18</sup>. I propose to touch upon three of them only.

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**18** Kirby M, "The High Court and the Death Penalty: Looking Back, Looking Forward, Looking Around", Australian Law Journal, vol 77, Dec 2004, 811.

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In *Tuckiar v The King*<sup>19</sup>, Mr Tuckiar who was described by their Honours in the majority<sup>20</sup> as a "completely uncivilised Aboriginal native"<sup>21</sup>, was charged with the killing of a police constable at Woodah Island in the Northern Territory. The conduct of the defence makes for a sorry tale. Counsel appointed to represent the accused was inexperienced and failed to object to irrelevant and prejudicial evidence concerning the good character of the deceased constable. After hearing evidence from the principal Crown witness, the trial judge suggested to Mr Tuckiar's counsel that he check with his client to ascertain whether the witness' evidence was correct. Subsequently, counsel said that he wished to discuss with the judge an important matter which put him in the worst predicament of his legal career. Afterwards, the trial judge, who had to the knowledge of the jury, heard counsel's communication, invited the jury to draw "any inference they liked" from Mr Tuckiar's failure to give evidence. Before sentence was pronounced, Mr Tuckiar's counsel announced in open court that he had been told by Mr Tuckiar that he had lied to one of the witnesses who gave evidence against him. Mr Tuckiar was sentenced to death. The High Court overturned the conviction and sentence. It held that the remarks of Mr Tuckiar's counsel would have so prejudiced the chance of a fair trial that a new trial should not be ordered.

The *King v Lee & Ors*<sup>22</sup> was a notable case for two reasons. First, Jean Lee was the last woman to be executed in Australia. Secondly, her application for special leave to appeal to the Privy Council was refused on 27 February 1951, eight days after she was hanged at

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**19** (1934) 52 CLR 335.

**20** Duffy CJ, Dixon, Evatt and McTiernan JJ.

**21** (1934) 52 CLR 335 at 339.

**22** (1950) 82 CLR 133.

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Pentridge Prison on 19 February 1951. Lee had been convicted of the murder, together with Robert Clayton and Norman Andrews, of William Kent in a Melbourne hotel room. Kent had been strangled. Although Lee had not participated in any act of violence against Kent, she was convicted pursuant to the doctrine of common purpose. An appeal brought by Ms Lee, Mr Clayton and Mr Andrews was allowed by the Victorian Court of Appeal. It was held that statements to the police had been obtained improperly because the statement of one was used to extract confessions from the other two. The High Court, in a single joint judgment, overturned the decision of the Court of Appeal and reinstated the convictions and death sentences. All three of the accused were then executed.

The last of the three cases is of particular interest because of the dramatic confrontation that occurred between the High Court and the premier of Victoria, Sir Henry Bolte<sup>23</sup>. In *Tait v The Queen*<sup>24</sup>, the appellant was convicted of murder. His sole defence was insanity. Sir Henry Bolte, it was thought, for political reasons, wanted a hanging to demonstrate an inflexible commitment to law and order. Tait appealed to the High Court from the decision of the Full Court of the Supreme Court of Victoria which had rejected the appeal to it. Sir Owen Dixon, as Chief Justice, ordered a stay of the execution pending disposal of the applications for special leave and any consequent appeal if leave were granted. The Chief Justice instructed the marshal to serve the Premier personally by directing him to put the order directly into the hands of the Victorian Deputy Premier. Apparently Sir Henry Bolte asked in Cabinet what the legal position would be if the execution were to proceed. The Premier and his Cabinet were persuaded by the stark advice that the essence of the crime of

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**23** Ayres, P, "Owen Dixon", The Miegunyah Press, 2003 at 280-281.

**24** (1962) 108 CLR 620.

murder was the deliberate and unlawful killing of one person by another. An execution in defiance of a judicial order would clearly answer that description. The death penalty imposed upon the prisoner was subsequently commuted, in part at least because of the controversy that had surrounded the challenges in the courts and the Executive's attitude to them.

### The International Context

Most recent executions worldwide have been carried out in a relatively small number of countries. According to Amnesty International<sup>25</sup>, in 2003 84 per cent of all known executions took place in China, Iran, Vietnam and the United States. In the same year, no fewer than 726 people have been recorded as having been executed in China. Some believe the true figure to be much higher. It should be remembered however that China has the largest population in the world. No fewer than 108 executions were carried out in Iran. A minimum of 64 people have been executed in Vietnam. Sixty-five people were executed in the USA.

It is impossible therefore to say that an international custom or usage has evolved prohibiting its use or requiring its abolition. The most important and comprehensive human rights treaty in respect of civil and political rights, the *International Covenant on Civil and Political Rights* (the ICCPR), in article 6 which is concerned with the right to life, contemplates the use of the death penalty, but would place these restrictions on its use: that it only be carried out "for the most serious [of] crimes"<sup>26</sup>, and it, the penalty, has been prescribed by a

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25 [http://www.amnesty.org.au/whats\\_happening/death\\_penalty/fact\\_and\\_figures](http://www.amnesty.org.au/whats_happening/death_penalty/fact_and_figures)

26 Art 6(2) of the ICCPR.

national law at the time of the commission of the offence<sup>27</sup>. Further, it can only be imposed pursuant to a final judgment of a competent court<sup>28</sup> and a right to amnesty, pardon or commutation must exist<sup>29</sup>. It cannot be imposed on offenders under the age of 18 and on pregnant women<sup>30</sup>.

There have been many efforts in recent years to restrict further, and if possible, to procure the abolition of the death penalty. Probably, the most important of these is the *Second Optional Protocol* to the ICCPR<sup>31</sup> which has as its object abolition. That protocol prohibits the penalty within those states that have ratified it, subject to one allowable derogation or reservation only. This is that at the time of agreement to the Protocol, the state make a reservation to allow the death penalty in times of war for the most "serious crime of a military nature"<sup>32</sup>. In 1990, Australia ratified the *Second Optional Protocol* without reservation.

The objective of reaching full international agreement on the abolition of capital punishment appears to be a distant aspiration. It is a politically divisive issue involving wider questions of religious and cultural values. Attempts by Western democratic nations which

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**27** Art 6(2) of the ICCPR.

**28** Art 6(2) of the ICCPR.

**29** Art 6(4) of the ICCPR.

**30** Art 6(5) of the ICCPR.

**31** Adopted by the General Assembly Resolution 44/128 on 15 December 1989, and entered into force on 11 July 1991. As at 10 February 2000 there were only 42 State Parties to this Protocol.

**32** Art 2(1) of the *Second Optional Protocol*.

have abolished the death penalty, to persuade other countries to abolish it have in some instances been regarded as an insulting form of cultural imperialism.

### The United States

The United States of America is the only Western democratic country in the world that retains the death penalty.

By the 1960s however most of the American states had ceased to carry out executions. In 1972, in *Furman v Georgia*<sup>33</sup>, the US Supreme Court ruled that that all death penalty statutes then in force were unconstitutional. It seemed to many that capital punishment had finally been eliminated in the US. The Court held that the death penalty was being applied in an arbitrary, capricious and discriminatory manner contrary to the Eighth Amendment of the United States' Constitution<sup>34</sup>. Georgia, Florida and Texas redrafted their death penalty statutes and these became the subject of a challenge in the 1976 case of *Gregg v Georgia*<sup>35</sup>. There, the US Supreme Court found that the death penalty was not unconstitutional provided that its enabling legislation ensured that a defendant would not be sentenced capriciously or arbitrarily. The Court upheld the validity of the redrafted statutes which established a "guided discretion" for imposing a death sentence.

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**33** 408 US 238 (1972).

**34** The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

**35** 428 US 153 (1976).

In 1988, a new federal death penalty statute was enacted for murders committed in the course of drug trafficking activities. In 1994, the federal death penalty was again expanded to include some 60 different offenses. These include: murder of certain government officials; kidnapping resulting in death; murder for hire; fatal drive-by shootings; sexual abuse crimes resulting in death; car jacking resulting in death; as well as certain crimes not resulting in death, including the running of large-scale drug enterprises. Between 1927 and 1963, the federal government executed 34 people, including two women. On June 11, 2001, Timothy McVeigh became the first federal death row prisoner to be executed in the United States since 1963.

The United States Supreme Court has however very recently ruled by a 5-4 majority that it is unconstitutional to execute juvenile murderers because to do so amounts to cruel and unusual punishment. This decision, *Roper v Simmons*<sup>36</sup>, reversed a 1989 Supreme Court ruling that allowed the execution of 16 and 17 year olds convicted of murder. Justice Kennedy, who wrote the majority decision, said that the US was the only country in the world that officially sanctioned the death penalty for juvenile offenders<sup>37</sup>. A "national consensus" had since developed against executing young offenders<sup>38</sup>. Justice Kennedy also cited recent scientific and sociological studies demonstrating that juveniles were less responsible than adults for their actions. Kennedy J said<sup>39</sup>:

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**36** United States Supreme Court, slip opinion, 1 March 2005.

**37** At 21.

**38** At 10-13 per Kennedy J.

**39** At 20.

"The age of 18 is the point where society draws the line for many reasons between childhood and adulthood. It is we conclude the age at which the line for death eligibility ought to rest".

According to Amnesty International, there have been some 944 executions in the United States since 1976, with 59 occurring in 2004<sup>40</sup>.

### Privy Council

Although the death penalty for murder was abolished in England in 1965<sup>41</sup>, the Privy Council has, in recent years, heard many appeals from prisoners on death row in the Caribbean states. The jurisprudence of the Privy Council has placed those countries in a difficult position: if they proceed to execute a prisoner before he or she has exhausted all possible avenues of appeal, they may violate due process rights; if they delay the death penalty for too long, execution may constitute inhumane treatment<sup>42</sup>. In two recent decisions delivered last year, the Privy Council upheld the constitutional validity of the mandatory death penalty in Barbados<sup>43</sup> and Trinidad and Tobago<sup>44</sup>.

### Wrongful Convictions

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**40** <http://www.amnestyusa.org/abolish/listpending.do?value=2004> and <http://www.amnestyusa.org/abolish/listbyyear.do>

**41** *Murder (Abolition of Death Penalty) Act 1965* (UK). The death penalty was retained for the offences of treason and piracy with violence and was abolished in 1998 under the *Crime and Disorder Act 1998* (UK).

**42** *Lewis & others v Attorney-General of Jamaica* [2000] 3 WLR 1785.

**43** *Boyce & Anor v The Queen* [2004] UKPC 32.

**44** *Matthew v The State* [2004] UKPC 33.

One of the most compelling reasons for abolishing the death penalty lies, as I have said, in the fallibility of the criminal justice system. Lawyers and judges alike are all too aware that miscarriages of justice can, and do, occur. The possibility of executing an innocent person, as a reason in support of abolition, has increased in prominence over the last 15 years as a result of the advent of DNA technology in criminal investigations. With a high degree of precision, DNA evidence can be used to identify perpetrators of crimes and thereby secure convictions, or to exclude suspects who might otherwise be falsely charged with and convicted of serious crimes.

A consequence of the introduction of DNA profiling has been the reopening of old cases. Persons convicted of murder and rape before DNA profiling became available have sought to have the evidence in their cases reevaluated using this new technology. Various studies and reports commissioned in the United States reveal a number of cases in which DNA test results have exonerated those convicted of the offences and have resulted in their release from prison. One such report was published by the National Institute of Justice in June 1996<sup>45</sup>. The National Institute of Justice is the research and development agency of the Department of Justice. The report identified 28 cases in which DNA testing had led to the exoneration of persons convicted of murder or rape and serving a sentence of imprisonment. Of the 28 persons exculpated, six had been convicted of murder.

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**45** "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial", published by the National Institute of Justice, June 1996 and available at <http://www.ncjrs.org/pdffiles/dnaevid.pdf>.

The Death Penalty Information Centre<sup>46</sup> reports that 116 people have been released from death rows in the United States since 1973 after evidence of their wrongful convictions emerged. Not all of the cases reported have relied upon DNA evidence to exculpate the person convicted. Wrongful convictions can be caused by a number of factors including mistaken eyewitness identification, coerced confessions, unreliable forensic laboratory work, law enforcement misconduct, and inadequate legal representation. The following two cases, however, are examples in which DNA evidence has been used to exonerate a person on death row.

In 1984, Earl Washington, who suffers from mild retardation, was convicted of the rape and murder of a woman in Virginia. After he was arrested on another charge in 1983, police convinced him to make a statement concerning the rape and murder for which he was later convicted. He later recanted. Subsequent DNA tests confirmed that Washington did not rape the victim. In 1994, Washington's sentence was commuted to life imprisonment with the possibility of parole. In 2000, additional DNA tests were ordered and the results again excluded Washington as the rapist. In October 2000, the Governor of Virginia granted Washington an absolute pardon<sup>47</sup>.

On 8 April 2002, Ray Krone was released from prison in Arizona after DNA testing showed that he did not commit the murder for which he was convicted 10 years earlier. Krone was first convicted in 1992, based largely on circumstantial evidence and testimony that bite

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**46** The Death Penalty Information Centre (DPIC) is a non-profit organization that collates and publishes information on issues concerning capital punishment. See <http://www.deathpenaltyinfo.org>

**47** "Innocence and the Crisis in the American Death Penalty", September 2004, available from <http://www.deathpenaltyinfo.org>.

marks on the victim matched Krone's teeth. He was sentenced to death. Three years later he received a new trial but was again found guilty and sentenced to life in prison in 1996. Krone's post-conviction defense attorney obtained a court order for DNA tests. The results not only exculpated Krone, but they also pointed to another man as the assailant. At a press conference in 2002, the Maricopa County Attorney stated "[Krone] deserves an apology from us, that's for sure. A mistake was made here. What do you say to him? An injustice was done and we will try to do better. And we're sorry."<sup>48</sup>

It is argued by some that the widespread use of DNA technology in criminal prosecutions has all but eliminated the risk of sending an innocent person to death row. Such an argument wrongly assumes that DNA evidence is always available at the scene of a murder. The fact is that DNA evidence is only of assistance to identify the perpetrators of murders where an exchange of bodily materials has occurred. According to the Death Penalty Information Centre, DNA exonerations represent only a small percentage of the 116 persons freed from death row in the United States since 1973. In 88 per cent of the cases, other evidence was relied upon to exonerate the person, such as a confession by the actual killer, witnesses who subsequently admitted that they were pressured into lying at trial, or the refinement of other kinds of forensic testing such as fingerprinting. Wrongful convictions are an unfortunate and unavoidable aspect of the criminal justice system. Advancements in DNA technology and crime detection will never overcome the possible risks of contamination and human error that so often are the cause of wrongful convictions. Appellate acquittals and reversals due to DNA testing only serve to underscore the risk of mistake generally.

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<sup>48</sup> "Innocence and the Crisis in the American Death Penalty", September 2004, available from <http://www.deathpenaltyinfo.org>.

Closer to home, the Lindy Chamberlain case illustrates that the courts and the criminal justice system are far from infallible. Mrs Chamberlain's appeal to the High Court was dismissed in 1984 by Gibbs CJ, Mason, Murphy, Brennan and Deane JJ. After the discovery of new evidence, an inquiry was established by the Northern Territory government. It quashed her conviction in 1988 on the basis principally of the serious flaws in the forensic testing and evidence of the expert witnesses.

Legal error also occurs. Sir Owen Dixon identified an error for example in the Privy Council's decision in *Director of Public Prosecutions v Smith*<sup>49</sup>. After it was delivered, Sir Owen wrote to Felix Frankfurter<sup>50</sup>:

"At the time I read it I did not verify any of the references but I have since learned that there is a striking error in the citation of *The Queen v Faulkner* (1877) 13 Cox CC 550. The quotation from Palles CB is of course correct but it is only a dictum and the actual decision was to the contrary of what Lord Kilmuir stated. Indeed it is a reasonably good authority in favour of the prisoner. The responsibility of any court in a capital case is unenviable and one does not like to criticise the judgment but if a man is to be sent to the gallows it is a little unsatisfactory to feel that a factor contributing in however small a degree to his hanging was an erroneous citation.

The High Court, led by Sir Owen Dixon, subsequently declined to follow the authority of *Smith's case* in *Parker v The Queen*<sup>51</sup>.

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49 [1961] AC 290.

50 Ayres, P, "Owen Dixon", The Miegunyah Press, 2003 at 276.

51 (1963) 111 CLR 610.

In conclusion, I wish to reiterate this. The criminal justice system is fallible. Mistakes occur. Any system that retains the death penalty will inevitably, even if infrequently, cause an innocent person to die. It is not within our capability to avoid the possibility of error. In my experience, the phenomenon of human fallibility is irrefutable, and, in my view, must be accorded primacy when weighing the arguments in favour of, and against, the death penalty. Deterrence is a desirable aim of any criminal justice system and is cited, with retribution, as a justification for the death penalty. Although much ink has been spent on discrediting the deterrent theory (often convincingly), ultimately, as a theory, it is impossible either to prove or disprove. While logic and intuition tell us that the possible consequence of death should act as a deterrent upon the rational mind, we just cannot be certain of the effect, if any, that it has upon a murderous or irrational mind. We cannot know whether its possibility or likelihood crosses the mind of the murderer as he or she plunges the knife into the victim, or whether, on occasion, it may persuade that person to leave the knife at home. So long as the deterrent theory remains unable to be proved (or disproved) by empirical or scientific analysis, it is possible that it may, if only infrequently, dissuade murderous intent. There does seem to be little empirical data to suggest that the death penalty is a greater deterrent than imprisonment for life without parole. The fallibility of the criminal justice system, the inability to prove the deterrence theory, and my personal revulsion of state sponsored execution of human beings support the abolition of capital punishment. In those jurisdictions like Australia where abolition has been achieved, it is important to remember that abolition cannot be taken for granted. One commentator suggests that the death penalty is never truly abolished but rather merely in a state of statutory abeyance<sup>52</sup>. The fact that capital punishment has been abolished in a particular jurisdiction does not mean that it will never be reintroduced. New Zealand provides

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52 Carolyn Strange, "The Half-Life of the Death Penalty: Public Memory in Australia and Canada", *Australian Canadian Studies*, vol 19, no 2, 2001: 81-99.

a good example. Having abolished the death penalty in 1941, it restored it in 1950, before abolishing it again in 1962. The death penalty was abolished in the United Kingdom in 1969, but from 1981 to 1994 there were 13 unsuccessful attempts in the British Parliament to reintroduce it.