

Reflections on the DEATH PENALTY

By Tom Percy QC

Following the Singapore execution of Van Nguyen, and as the possible execution of two young Australians in Bali draws closer, Alliance member, Perth silk Tom Percy QC, reflects on his own brushes with the death penalty...

I once supported the death penalty. It had a fundamental righteousness about it, an eye-for-an-eye type of justice, with a superficial but immediate appeal to it.

A fortuitous sequence of events was, however, to change my mind, as I came into close contact with two men and a woman who had each experienced the shadow of the gallows.

Even though we haven't hanged anyone in Australia since 1967, and in WA since 1964, those unlucky enough to be convicted of wilful murder in Perth were still sentenced to death until 1984, when the mandatory penalty was removed from the Criminal Code.

The last one of those was a country woman named Brenda Hodge, who was convicted of the shooting of her abusive defacto husband in my home town of Kalgoorlie in 1984. She was my client, and I was junior (very junior) counsel to Henry Wallwork QC¹ at her trial.

We all believed that she wouldn't hang, but watching on as Mr Justice Pidgeon pronounced the litany of the death sentence was something I shall never forget.

It was a galling experience; like something out of a movie, but it was real, and had the full force of the law. Technically she was a dead woman walking. The terror in her eyes as the sentence was passed, and sitting with her in the cells afterwards, will haunt me forever. I had started to re-assess my views on the death penalty.

But they didn't hang Brenda Hodge. She survived prison, was recently released, and has written a book about the experience. At the time of her trial the concept of the battered woman syndrome was not recognised by the law, and the concept of provocation as we now understand it was quite different. Were she to be tried today, there is every prospect that she would be acquitted.

Fifteen years later I came to meet a man called John Button, and took on his case against what appeared to be a wrongful conviction in 1963 for the death of his girlfriend. He

had not been sentenced to death, having only been convicted of the alternate offence of manslaughter, but he did stand trial for wilful murder in an era when a conviction for that offence meant he would almost certainly have been hanged. >>



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We won, and he was ultimately acquitted in 2002. On the basis of fresh evidence, the Court of Appeal found that he had been wrongly charged for another man's crime. But the reality of the fact that he came within an ace of being executed hardened my opposition to the death penalty. It was a little too permanent for my liking...

As a result of my involvement in Button's case, I was asked to take on the re-opening of Darryl Beamish's case in 2004. He was a mentally impaired youth who had been sentenced to death in 1961, and was extremely fortunate to have been reprieved from hanging.

Only the fact of his age (he was 20 when he entered death row at Fremantle) and the fact that he was a deaf mute saved him. Meeting Beamish for the first time was a bewildering experience for me, knowing that we as a community almost murdered him for something I was sure he didn't do. The 15 years' prison he wrongly served for the offence was hard to get my head around, but nothing compared to the fact that he had been sentenced to death and was spared his execution only by the accident of his own physical disabilities.

The Court of Appeal were also to reach this conclusion in 2005. He had been wrongly convicted for the crime of another man. The perpetrator was ironically the same man who had been the true killer in Button's case. My involvement in this case galvanized me (if any galvanization were still required) in my resolve that there could never be

any justification for the process of a community putting one of its own members to death.

Some years ago I asked Leo Wood, one of Perth's leading criminal lawyers of the 50s, 60s and 70s, what he thought of the death penalty. (He had represented several men sentenced to death, although none were actually executed.) He didn't agree with it, he said, on the grounds that it was "too hard on the lawyers..."

Obviously not all persons convicted of capital crimes are wrongly convicted. The vast majority of these cases will involve the right person. But what of those that don't? Where the system gets it wrong?

Proponents of capital punishment assure us that the possibility of a mistake is so unlikely that we need not worry about it.

I can't subscribe to that theory. Nor, I suspect, would at least three of my former clients. ■

Notes: 1 Later Wallwork J of the Supreme Court of Western Australia. 2 *Walk On*, Five Mile Press, Victoria, 2005.

Tom Percy QC is based at Woolff Chambers in Perth.

PHONE (08) 9218 9200 EMAIL percyqc@wolffchambers.com.au



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