

BOOK FOREWORD

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The Hon Justice Michael Kirby CMG

Capital Punishment is an issue which, at least in recent history, has engendered much passion. The execution by hanging in Malaysia, in 1986, of two young Australians convicted of drug trafficking and the spate of brutal murders, reported in the media, has lately rekindled a debate in Australia which many thought had been put to rest by the repeal of the last legislation providing for the death penalty. Not only have we seen serious proposals voiced at party political assemblies, that the death penalty should be restored in order to deter homicide and properly to punish those guilty of it. We have also witnessed ugly scenes outside police stations and court houses and otherwise good citizens calling, sometimes hysterically, for the reintroduction of the death penalty as the only punishment that will adequately avenge an angry (and sometimes despairing) community, shocked by the revelations of criminal violence.

It would be a mistake to ignore this revival in apparent public support for capital punishment in Australia. This book is Barbara Zwickler's response to the undoubted trend in popular opinion. In it she puts her case against what she believes to be the barbaric nature of capital punishment. She expresses her opinions in direct and unmistakable terms. She

confesses that her opinions are not the product of a dispassionate and intellectual evaluation of the arguments and available evidence. Instead her opinions arise out of a deep emotional involvement in the issue since her early childhood. The book is an emotional plea for the abolition of capital punishment (and more specifically hanging) in those jurisdictions in which it is still used. By inference, it is an appeal to the Australian community, which has abolished capital punishment in all of its jurisdictions, to hold fast to that abolition and not to reintroduce the extreme penalty, despite transient shifts in public opinion that would appear to favour that course.

The amount of writing on the subject of this book is enormous. Much of it (on both sides of the debate) adopts the same appeal to emotion as grounds Barbara Zwickler's approach. In a subject of this kind, it is difficult to avoid emotion. However, there is another stream which reaches the same destination but which grounds its conclusions in a more empirical, and less linguistic, approach. An example of this kind of argument is well known to me. In 1980, the Australian Law Reform Commission delivered an interim report on the Sentencing of Federal Offenders. That report contained some consideration of whether capital punishment should be reintroduced for some at least of the more serious offences provided by Federal law in Australia. It is interesting to note that the first Act of the Whitlam Government was for the abolition of the remaining instances of capital punishment in Federal jurisdiction. That policy had long been a commitment

of Labor governments, both at the State and Federal levels. The first State to abolish capital punishment in Australia was Queensland which did so under a Labor government. Gradually, in other States, Labor governments sponsored either the abolition of the punishment from the statute book or a consistent policy of the executive government to extend advice that the extreme penalty would not be carried out. For a time, these differences in policy were reflected in different laws and practices in various Australian jurisdictions. Putting it broadly, Labor governments tended not to hang; non Labor governments tended to favour the retention of hanging for at least the most serious cases of homicide.

This differentiation in the policies of different governments in different periods and in different parts of a basically homogeneous Australian society provided the law reformer with an interesting database from which to draw statistical information and policy inferences, concerning the suggested effectiveness of capital punishment (or the risk that it would be carried out) in deterring the incidence of homicide.

The results of these comparisons are set out in the Law Reform Commission's report. They tend to confirm comparisons of homicide rates in countries which have retained or abolished the death penalty. They provide no empirical basis for the widespread belief that the existence of a risk of capital punishment is an effective deterrent to serious crime. Furthermore, in the Australian context, the Law Reform Commission report pointed to a particular consideration which needs to be examined in this context. It is whether, in a

community where opinions about capital punishment tend to be polarised, the risk that an accused person, if convicted, may be hanged, may not sometimes result in the acquittal of persons who might otherwise have been convicted. In short, such is the finality of execution, the awfulness of the punishment, the horror that it engenders in some people in the community and the public consciousness of celebrated errors (such as the case of Timothy Evans) that a jury may refuse to convict a person who could have been convicted, if the punishment were one of life or otherwise long-term imprisonment. Whether the prisoner faces a punishment of hanging, life imprisonment or other long period of imprisonment, the instruction of the judge to the jury would be the same. Unless convinced that the Crown has proved its case beyond reasonable doubt, the prisoner should not be convicted. But there is some evidence that extra care, and special caution, is exhibited by juries where there is a risk of capital punishment. This evidence is to be found in a comparison of the conviction rates of juries in cases of homicide during the period of Labor and non Labor governments in Victoria immediately after the Second World War. Thus, the capital punishment debate in Australia may have to consider this particular factor, at least before any steps are taken by governments and Parliaments to reintroduce this form of punishment.

The General Assembly of the United Nations Organisation has proclaimed "the desirability of abolishing [capital] punishment in all countries". The International Covenant on Civil and Political Rights, to which Australia is a signatory,

also contemplates the abolition of the death penalty in those countries and jurisdictions which have retained it. Similarly, in the Council of Europe, there has been a development towards the complete abolition of capital punishment in those relatively few jurisdictions which still retain it in Europe. That valuable international agency of human rights, Amnesty International, has as one of its main platforms the exposure of the injustices and abuses that can attend the regular use of capital punishment.

These remarks show that there are several fronts upon which the opponents of capital punishment must operate in resisting the wave of popular and political sentiment for the restoration of the death penalty in particular cases. The debate presents politicians with a special dilemma in a democracy. If (as recent opinion polls suggest) two out of three or three out of four Australians support the restoration of capital punishment for particular crimes (eg terrorism, multiple murder, murder of police and prison officers or other aggravated murder), the question is posed: what right does a politician have to resist this strongly held, and apparently growing public mood? The answer is that those who study this subject can expose to the politician information which the general public may not hear, and may not want to hear. That information will include details of the errors that can occur, because if the risks that are inherent in our system of criminal justice. It will also include the problems that may arise in securing convictions where there is a peril that the prisoner will be hanged. But as well as these rational,

empirical and statistical arguments, there is a need for a due measure of appeal to emotion and sentiment. For what is at stake, ultimately, is human life and our respect for it. This is where Barbara Zwickler's book makes a contribution to a continuing debate. It seems likely that, even in Australia, it is a debate that will not go away. So this book may have an unexpected relevance.

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1 December 1987.