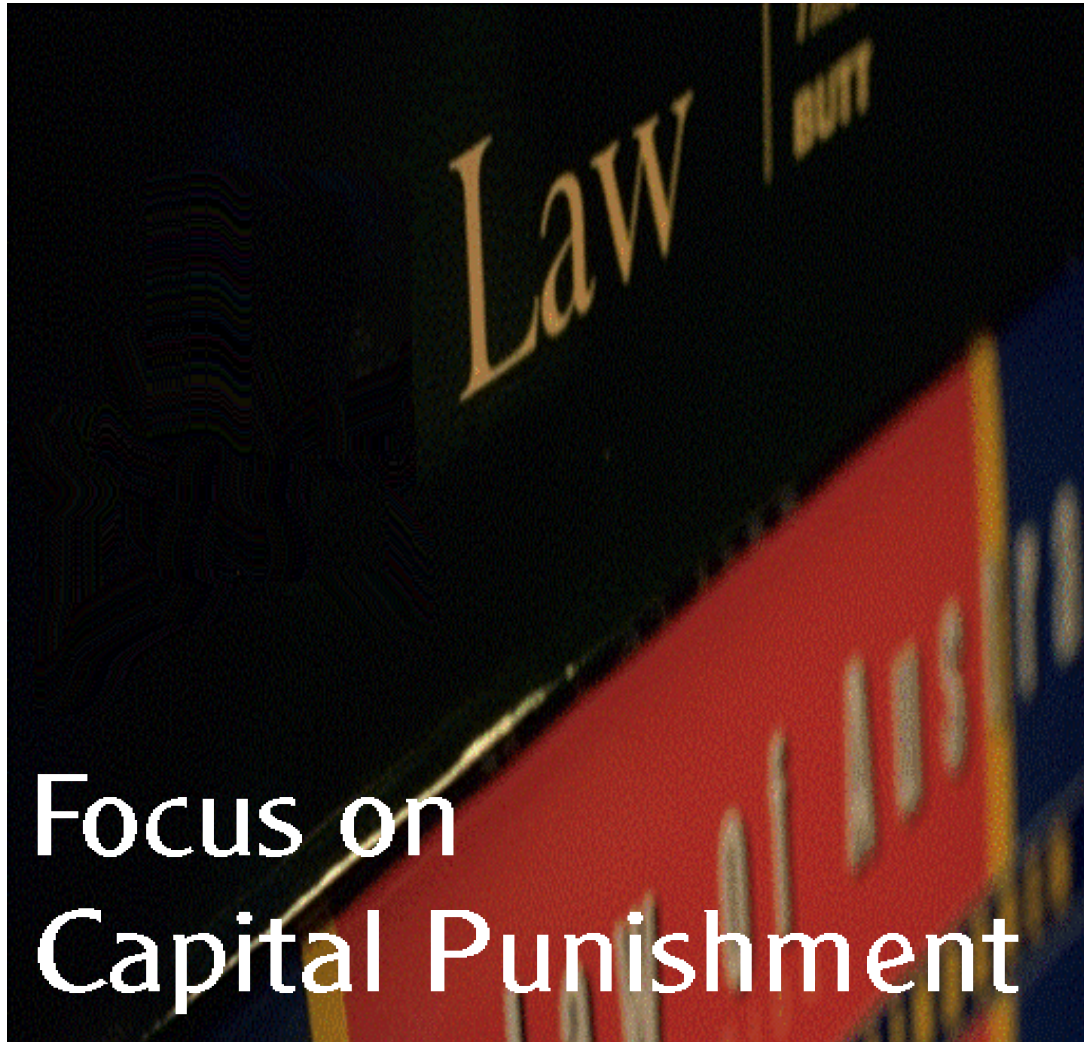


Melbourne Law School

# In Re

The Melbourne Law Reporter

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## In Re

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# Lethal Laws

Tim Wright considers the current debate on death penalty, in light of international humanitarian law.

The hanging of Melbourne man Nguyen Tuong Van in Singapore on 2 December last year sparked a passionate debate in Australia. Some critics, such as Robert Richter QC, condemned the act as one of barbarians. Others, in response to a study by a prominent United States economist and law professor, examined whether the death penalty is an effective deterrent and economically beneficial to society.

The vast majority of commentary, however, focused on whether Australia should be permitted to cast judgment upon, and actively campaign against, the actions of a foreign government. Singapore's high commissioner in Australia had much to say on this matter.

I had the opportunity to speak to Foreign Minister Alexander Downer just two weeks before Nguyen's execution. He appeared genuinely upset that a young Australian citizen was soon to meet his death at the hands of a foreign government for committing a non-violent crime. But he seemed resigned to the belief that there was little his own government could do to prevent it. 'We're exploring some last-minute legal manoeuvres, but I'm not particularly hopeful,' he informed me.

Of course, there was much more the Australian Government could have done, not only to prevent the execution of Nguyen, but also to

promote the message that death is an inappropriate and disproportionate punishment for any offence, especially a non-violent offence such as drug trafficking.

Australia has generally demonstrated a firm opposition to capital

posing death as a form of punishment.

Australia's permanent mission to the United Nations has for many years actively promoted the worldwide abolition of capital punishment. On 20 April 2005, for example, it co-sponsored a Human Rights Commission resolution that called upon all nations to end the practice of killing their own people.

But this official stance is not in keeping with some of the utterings of our Prime Minister. In February 2003, John Howard announced that Australia would not oppose a decision by an Indonesian court to execute the perpetrators of the Bali bombings. A month later, he informed the Canberra Times that he, and the Australian people, would have no problem with seeing Osama bin Laden executed for his crimes against the United States.

This represents a troubling and quite significant shift in government policy.

The position adopted by other governments around the world is varied. Almost all democratic nations in Europe and the Americas have abolished the death penalty and signed the Second Optional Protocol. A notable exception is the United States, which recently executed its one thousandth person since the death penalty was reintroduced there in 1976.

*(Continued on page 3)*

Source: UN, Report of the Secretary General to Economic and Social Council, E/2005/03, Session July 29, 2005

Country or territory	Total executions 1999-2003	Estimated annual rate per 1 million of the population
Rwanda	-	-
Saudi Arabia	403+	3.66
Sierra Leone	-	-
Singapore	138	6.9
Sudan	53+	0.33
Taiwan	67	0.59
Tajikistan	35+	1.17
Thailand	43	0.14
Uganda	33	0.29
US	385	0.27
Uzbekistan	35+	0.28
Viet Nam	128+	0.32
Yemen	144+	1.51
Zimbabwe	3	0.05

punishment. We are one of 56 nations to have signed and ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, which prohibits states party from im-

(Continued from page 2)

In our region, the only countries to have fully abolished the death penalty are New Zealand, East Timor, Cambodia and a handful of small island nations. A number of other nations, including Papua New Guinea and Burma, have abolished it in practice. The vast majority retain it, and some use it regularly.

International humanitarian law has attempted to limit the circumstances in which the death penalty may be imposed and the classes of persons it can be carried out against. However, not all countries recognise the jurisdiction of the International Court of Justice, and many treat the decisions of the Human Rights Commission with contempt.

Most governments that permit the use of the death penalty do so only in relation to the crimes of treason and murder. Its use in relation to drug trafficking and other non-violent crimes has been the subject of much criticism.

China, Indonesia, Malaysia, Saudi Arabia, Singapore and Vietnam all permit, and often encourage, their judges to issue death as the penalty for various drug-trafficking offence. The Singaporean Government, in response to anger over the Nguyen case, asserted that the trauma caused to families by drug use is as grave as that caused by murder.

In the 1990s, roughly 2500

people were executed annually on average worldwide. The annual number of executions carried out in the first five years of the 21st century has been marginally higher, according to Amnesty International. The biggest killer by far is the People's Republic of China, which is home to more than one-sixth of the world's population.

Iran, Saudi Arabia, Kuwait and Singapore all execute well in excess of one in every one million of their residents annually. According to the United Nations secretary-general, the highest per capita executor between 1994 and 1999 was Singapore.

However, to its credit, Singapore will not execute a person if he or she was a juvenile at the time of committing the offence in question. Had Nguyen been five years younger when he made his ill-fated stopover at Singapore Changi Airport, he would have been spared the gallows.

The only countries that still impose the death penalty for juvenile offenders are the Democratic Republic of the Congo, Pakistan, Yemen, Saudi Arabia, Nigeria and Iran, even though they have all ratified the Convention on the Rights of the Child.

The landmark United States Supreme Court decision of *Roper v Simmons* declared juvenile executions in the United States to be unconstitutional. Seventy-two convicted felons were subsequently removed from death row.

In spite of this development, it is unlikely that the death penalty will be abolished in the United States soon, given the unwavering popular and government support for its retention.

Perhaps the greatest hurdle in the quest to abolish the death penalty worldwide has been terrorism and the fear that it has invoked in so many people. A Newspann poll in 2003 showed that 56 per cent of Australians supported the reinstatement of the death penalty for terrorists. A similar result was obtained in a November 2005 poll.

Thankfully, though, the drafters of the 1998 Rome Statute to establish the International Criminal Court were wise enough to recognise that the crimes within the new court's jurisdiction—genocide, war crimes and crimes against humanity—should not, in spite of their heinousness, be punishable by death. If terrorism were added to that list, as it may well be in several years, then the same rule would no doubt apply.

If any institution, be it a government or an international court, wishes to teach people to revere human life and to abhor human suffering, then that institution must itself demonstrate a reverence for human life and an abhorrence to human suffering. Unless it does, the old law of an eye for an eye will prevail—and leave the whole world blind●

The Melbourne Law School Reporter invites applications from 1st yr (straight LLB) or 2nd yr (Double Degree) students for Junior Editorial positions.

Please email the Editor-in-Chief, Karthi Subramaniam at [karthi.subramaniam@gmail.com](mailto:karthi.subramaniam@gmail.com) with a brief letter of interest.

# Prosecution v. Defendant: What of the victim?

Sanjay Palakrishnan, on victims of crime in Australia.

“

I had a hole in my head. I mean he actually knocked a hole in my skull. I had 12 stitches – it was a compound fracture of the skull. When I finally got to hospital it was 13 hours later before I had an operation, where the neurosurgeon had to get in and take the chips off the top of my brain, settle me down I suppose, because for the next eight months, I was to go round with a hole in my head, because it had to settle down before he actually fitted a titanium plate to my skull.—Dan, victim of armed robbery (the perpetrators were never found)”

It's about time increasing focus is paid to victims' rights in the criminal justice system. But so far, this long overdue attention has simply not yielded enough redress for the victim – whether the immediate victim or close relatives who are themselves victims in their own right. I am concerned with the Court's recognition (if at all), of the immediate victims of crime. Some of the issues canvassed will be unique to victims of sexual assault.

Admittedly, there has been some progress. Indeed, victim support networks have sprung up in each State. In Victoria, the Victims of Crime Assistance League (VOCAL) has provided aid to victims for over twenty-five years. In NSW, Queensland, South Australia Tasmania and ACT, similar support groups have emerged as a result of “community action”. Western Australia is distinct in that its “Crisis Care Units” were the result of government initiative. However, such networks operate outside the forbidden walls of the courtroom. It is in the courtroom where the victim is “processed”. It is in the courtroom, as Grix tellingly recalls, where the victim is put in place: “I sat on a wooden seat. In a wooden pen. With my feet touching the wooden floor”. It is in the courtroom where the accused does not have to take the stand while the victim, as key prosecution witness, must do so. It is in the courtroom where the victim is often subjected to intense cross-examination, then subjugated on issues of credibility. Indeed, it is in the courtroom – this “objective vacuum” – , where often victims feel “re-victimised”; where, in particular, rape victims “feel raped all over again” – only this time with the sanction of the State.

Considering the overwhelming majority of such victims are women, this revelation questions the

legitimacy of the Courts.

In the context of sexual assault offences, restrictions have been placed on cross-examining the victim about her “sexual history”. However, other loopholes can be exploited. If sexual reputation evidence is “substantially relevant” to the proceedings, this may be permitted. Further, questions about her attire and her sobriety at the relevant time are permissible. The preoccupation with attire implies that the victim sought attention deliberately, or, even worse, was a willing party. This brings the Court dangerously close to institutionalising the objectification of women. Here, the quest for “truth” may compromise the need for justice.

Conversely, some safeguards have been put in place. In several States, sexual assault victims can be cross-examined via “closed circuit television” – rather than enduring face-to-face confrontation with the perpetrator. Further, the Crimes Act 1914 (Cth) prohibits “unrepresented” defendants questioning a child victim of sexual assault. Such measures can reduce distress. More generally, a victim of crime can have psychological support from an officer of the court, a friend or a relative during proceedings. The exception, of course, is when the victim takes the stand. Where necessary, a screen may be placed to avoid the discomfort of facing the defendant. Sight of the defendant may trigger unpleasant memories of the crime. Further it may have an adverse psychological impact. Many victims of crime are already susceptible to “post-traumatic stress disorder”.

However, such measures are not enough. The use of “victim impact statements”, now a widespread practice, only occurs at the sentencing stage. Prior

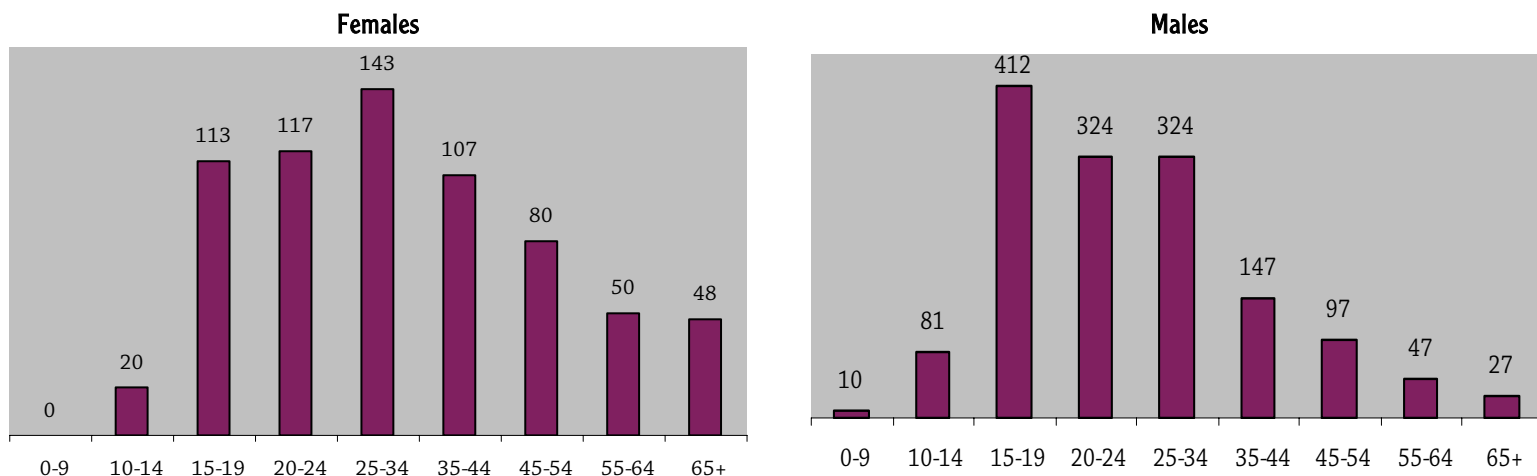
to that, the victim is at most a key prosecution witness, whose testimony is meticulously tried and tested. In the event of an unjustified acquittal, the victim's “voice” may never be heard. All that is heard is a battle of contorted narratives presented by both defence and prosecution. Hence, the victim's point of view, in its purest form, only surfaces upon proof of guilt beyond reasonable doubt. Perhaps this is rightly so. The oft-quoted “better for ten guilty people to go free than for an innocent party to be convicted” provides justification for such restraint. Indeed, witness testimony should be tested for its accuracy, so that a tribunal of fact is definitively satisfied of a defendant's guilt. But this philosophy overlooks one concern: the failure of the criminal justice system to recognise the victim as a party with a vested interest in the proceedings.

The victim is no mere witness, indistinguishable from any other. S/he not only represents self, but the community that has been wronged. On this view, it is necessary to revisit the role of the deputy public prosecutor in representing the interests of the community. Arguably, as a representative of the community, the victim's interests should be accommodated. The victim should be allocated a position in the courtroom from which s/he can assist in the prosecution of the defendant, especially where the defendant voluntarily takes the stand. It is suggested that s/he should be seated beside the public prosecutor. This would enable the victim to:

- have specific questions put to the defendant, and/or
- assist in refuting the allegations of defence counsel.

It would also empower the victim by giving her or him a “voice” during the trial process, the most crucial stage for the determination of guilt.

## Prosecution v. Defendant: What of the victim?



VICTIMS OF HOMICIDE, ROBBERY AND RELATED OFFENCES, By Sex and Age Group - 2004

Source: ABS Recorded Crime Australia 2004

## Outsourcing Legal Services

The use of offshore legal service providers is becoming increasingly popular and some estimates approximate the number of jobs in the US legal sector to move overseas to be about 40,000 by the year 2010. Other estimates put the number at nearly double that by 2015. The great majority of these jobs will move to developing countries, notably to India where there is a large pool of well educated, English speaking talent that demand annual wages of between US\$3,000 and US\$10,000 – almost 75% less than paid to their western counterparts.

The founder of a Mumbai based outsourcing firm that employs 40 lawyers says that it is not all backroom ‘grunt work’ which is outsourced, but a range of legal work including drafting, patent applications and monitoring and document review and analysis. In larger disputes, this would involve ploughing through thousands of pages to find relevant documents which will support a legal argument.

In theory, outsourcing legal work to someone in India is no different than outsourcing accounting or information technology work, a common enough practice by businesses to greatly reduce their operating overheads. On the face of it outsourcing seems to be a straightforward business decision.

There is however the problem of liability – what happens if a contract is badly drafted? As outsourcing firms are not considered to be ‘practising’ in any jurisdiction, but viewed rather as akin to support staff, the ultimate liability still rests with the hiring firm which outsourced the work in the first place.

As always, there will be also be concerns regarding privacy and the quality of the work. But many Western law firms have been outsourc-

ing much of their sensitive work to professional printers, outside word-processors and technology vendors. If the information technology outsourcing industry in India is any indicator, these concerns are relatively minor.

Forrester Research says that the risks involved in outsourcing legal work to another country also has a lot to do with pre-conceptions. For example, if a law firm in Sydney makes a mistake, there is going to be relatively little coverage, but if that law firm happens to be an outsourcing outfit based in India, there is probably more of a public relations risk.

If there is a plentiful supply of cheap Indian lawyers, will it then make certain litigation cases more viable and common? Arguably, this should be the case as law firms are able to throw armies of offshore lawyers to sort through documents which would cost significantly more in the USA or Australia. Many corporations settle cases just on the fact that litigation can be an enormously expensive exercise. When the cost of litigation is reduced through outsourcing, corporations will perhaps be less inclined to settle, which might lead to an increase in litigation.

Australian law firms are just beginning to utilise outsourcing opportunities. Some Australian firms also routinely utilise Indian firms for transcription services, which involve typing up very complex contracts. The Australian lawyer is able to dictate the contract in MP3 form to be emailed to India and have it back, also via e-mail. Cost issues aside, the time saved in this instance is apparent. Medium sized Australian firms are also testing the waters by engaging Indian firms to prepare research which has already been prepared earlier by the firms’ own associates. This would give an indication of the level of sophistication and legal acumen possessed by the Indian firm, before mandating the firm with more substantial work. ●

# 2005, through the looking glass

Terri Abeysekera examines five of 2005's legal developments, reflecting on the year that was.

2005 proved to be an eventful legal year for Australia with the addition of controversial new laws to our system as well as several landmark High Court decisions.

## 5 New Judge on The Block: Susan Crennan's High Court appointment

Following Justice McHugh's open challenge to the government to appoint a woman to replace him, Susan Crennan's appointment to the High Court in October last year was a major legal development.

However, Justice Crennan's appointment to the High Court, as only the second woman judge of the High Court since its first sitting in 1903, also reveals deep systematic problems within our legal system. The absence of women on the High Court bench in recent years, given that there are seven judges sitting in the High Court, is an example of the kind of structural barriers that women today face in becoming senior professionals in law. According to Professor George Williams, the director of the Gilbert and Tobin Center of public law at the University of New South Wales, women lawyers even arguing cases in the High Court is a rare sight. And it certainly isn't a question of women not being qualified enough; from Attorney-General Phillip Ruddock declaring Crennan "the best person for the job" to The Age's profiles of "McHugh's angels" – the kinds of "top-class women lawyers" Justice McHugh would approve taking his place – these women stand shoulder to shoulder with their male counterparts.

**"... women lawyers even arguing cases in the High Court is a rare sight..."**

While it has long since been apparent that glass ceilings exist within the law profession for women, the real barriers of discrimination, implicit in selection processes and other structural facets of our legal system are inexcusable. While Justice Crennan's appointment may go some way in redressing this problem, to effectively break through these glass ceilings, what we need, in Justice McHugh's words, is the creation of, "a judiciary in which men and women are equally represented."

## 4 To advertise or not to advertise, that is the

question: *APLA Ltd v Legal Services Commissioner (NSW)*

Another significant development of the past year was the High Court decision in September, which validated by majority the latest restrictions on lawyer advertising.

The Legal Profession Amendment (Personal Injury Advertising) Regulation 2003 (NSW) added further restrictions to the Legal Profession Act 1987, limiting the ability of a NSW lawyer to advertise their services. While the reforms were passed as a result of a perceived public crisis in relation to public liability insurance premiums, the APLA have a different view. Dr. Peter Cashman, general counsel at Maurice Blackburn and Cashman, a firm who originally filed a claim alongside the APLA, said, "The legislation prevents injured people from having access to justice...The Government has clearly gone too far."

The APLA challenged the regulations on a number of grounds, including that the regulations infringed the implied right of political communication as well as the rule of law implied in the Constitution. The majority judgment however, by Gleeson CJ, Gummow, Heydon, Callinan JJ affirmed the NSW government's position and rejected all these grounds of appeal.

These NSW regulations, in the author's opinion, have gone too far. Without lawyer advertising, public access to information about their legal rights and any personal injury laws that might affect them is greatly restricted. In legislating with respect to personal injury law and the availability of legal services, the executive legislating body goes beyond mere law making to infringe certain important rights. The outcome of this case doesn't fit comfortably with our constitutional traditions, which require courts, and thereby legal information, to be adequately accessible. Where this doesn't happen, it is the duty and responsibility of our courts to protect rights such as access to justice against their erosion by the executive.

## 3 'Climate of intimidation': Journalists and freedom of speech

Governments using new and existing laws to quash exercises of free speech seemed to be a consistent theme of 2005; a case in point was that of the two Herald Sun journalists who, armed with secret documents, detailed a cabinet proposal that the Federal Government was about to

*(Continued on page 7)*

(Continued from page 6)

back out of a promise to deliver an extra \$500 million in widows' and war veteran' pensions.

Gerard McManus and Michael Harvey of Melbourne's Herald Sun newspaper faced contempt charges in the Victorian County Court in July last year after refusing to disclose their sources. Even after they were granted immunity from possible self-incrimination, the reporters told the court they couldn't breach their professional ethics by disclosing their source. Chief Judge Michael Rozenes replied that they couldn't place their ethics above the law of the land.

The current status in Australia is that there is no constitutional or other legal right to the freedom of speech or any protection for whistleblowers, or journalists such as McManus and Harvey who use such information. This is in stark contrast to the use of contempt charges to force journalists to name sources. While the problem doesn't simply exist here, with prominent journalist Judith Miller of the New York Times also being jailed for contempt (for refusing to reveal sources), this clamp down on free reporting only contributes to an accelerating erosion of the press's freedom in Australia. In the author's opinion, the result of such cases where McManus, Harvey and their source face jail time, simply because a bad policy idea was exposed to public scrutiny is to create a 'climate of intimidation' where free reporting is just another unachievable ideal.

## 2 The importance of selling policy: IR laws and the government's \$55 million advertising scheme

The Howard government's controversial industrial relations legislation passed late last year was also one of the key legal developments of 2005. The conflict-ridden changes however, were met with staunch opposition, with the Australian Council of Trade Unions (ACTU) even bringing a case attempting to take on the new laws.

In an attempt to disrupt the Government's plans of introducing the changes, the ACTU brought a case last year questioning whether the \$55 million amount spent on the IR advertising campaign was valid appropriation under law. Although the campaign was up and running before legislation was even tabled, the case was unsuccessful, with the High Court finding for the government in ruling that the expenditure was authorized by parliament.

The ACTU case, on a deeper level though, revealed an important truth; that there aren't nearly as many limitations as might be thought on government expenditure. Professor Stephen Bartos, Director of the National Institute for Governance agrees, pointing out that the somewhat "shadowy" Ministerial Committee on Government Communications is the organization responsible for decisions pertaining to government ad campaigns. This organization, according to

Professor Bartos, "...takes[s] the decisions on how money will be spent [for ad campaigns] without any accountability through to the parliament or the people more generally." For an organization which has an approximate budget of \$100 million a year, that can't be good.

In another challenge to these new laws, State governments including NSW, South Australia and Queensland launched an action in the High Court early this year questioning the constitutional validity of the legislation. The case promises to be an important development in the area of the division of power between the States and the Commonwealth, and is likely to continue for several months after the introduction of the new IR system.

## 1 Democracy v. despotism: Anti-terrorism legislation and their effect

The sprint through Parliament of sweeping counter-terrorism laws ended the year's main legal developments on a tentative note. Essentially, according to Professor George Williams, with new control orders and sedition offences being some of the main elements of the new laws, our legal system has crossed a fundamental line in the way we deal with criminal justice.

These new anti-terror laws, which include an element of preventative detention, add to their 2002 counterparts which already included laws permitting ASIO to detain and interrogate individuals about information pertaining to terrorist activity. Leading criminal defense lawyer Rob Stary argues the noticeable absence of such preventative detention in most modern democracies, is because it is contrary to standards of due process and transparency as, "...the State in such cases isn't required to prove any element of the offence and accused persons are often removed and prosecuted in secret circumstances."

The danger of this type of legislation for Australia is the fact that due to our lack of a Bill of Rights, our harsh new laws are short of a human rights framework against which the offences may be interpreted, the result being that our freedoms are open to qualification by law-makers and officials.

While there is an obligation on the part of the Government to protect the country and its citizens from terrorism, whether it should do so at the risk of losing the very freedoms it aims to protect in the first place is a conflicting issue. The author agrees with Professor George Williams on this point that tough new laws will not stop terrorist activity, that it is in fact is the very dynamic that terrorists rely on. The isolation of communities in such a way as to lead them to terrorist tactics as a means to be heard is what we risk in passing tougher and tougher laws. And that, just leaves us right back where we started ●

# Capital Punishment

Joanne Khoo examines whether the death penalty is a deterrent of violent crimes – or just the opposite?

2nd December 2005 was a mournful day for Australia as 25-year-old Nguyen was executed after being caught and convicted in Singapore for trafficking 396 grams of heroin. Hundreds of solemn mourners gathered at Sydney's Martin Place to pay Nguyen their last respects as Nguyen's lifeless body hung from the hangman's noose. Amnesty's anti-death penalty coordinator, Tim Goodwin in his interview with Lateline described the day as a sombre and reflective day.

"I think I've never seen a protest quite like it in all my years of working on human rights. People were coming together in public places and crying openly, hugging each other and laying down flowers and I think just having those few moments of silence with their thoughts about those terrible things that were happening..."

Nguyen's case sparked off impassionate debate about capital punishment throughout Australia and the world. Pro capital punishment believers argue that death penalty is a means of retribution and acts as a deterrent. On the other hand, those against capital punishment believe that you cannot justify punishing the crime of murder or lesser crimes with murder and that capital punishment does not serve its intended purpose of deterrence.



The question to be asked here is not whether capital punishment will reduce crime rates. Capital punishment just like any other punishment will instil fear and consciousness in people which will then deter people from committing crimes. Thus, the right question is: Whether capital punishment is a more effective deterrence than other forms of punishment such as life-long imprisonment?

Deterrence is defined by the Webster dictionary as "the inhibition of criminal behaviour by fear especially of punishment." In addition, the punishment must be administered swiftly so that potential criminals will see a clear cause and effect relationship between the crime and the punishment. "General deterrence" is referred to when punishment deters potential

criminals from committing crimes. Another kind of deterrence, "Specific deterrence" refers to the inability of convicted criminals to commit further crime as a result of their punishment.



Contrary to popular belief, there is no concrete statistical evidence which supports the idea that the death penalty is a more effective deterrence than other forms of punishment. Hundreds of studies have been done and they consistently show that there is no link between capital punishment and the reduction of crime.

For example, in a study done by Archer and Gartner (1984) in fourteen countries that abolished the death penalty, it was discovered that abolition did not cause an increase in homicide rates.

One landmark study with respect to deterrence and the death penalty was conducted by a nationally renowned sociologist at the University of Pennsylvania, Thorsten Stellin in 1959. Stellin discovered through a comparison of abolitionist and retentionist states, that homicide rates in abolitionist states were not significantly different from the rates in retentionist states. From the evidence, he drew the inevitable conclusion that executions have no direct effect on homicide death rates. His evidence was then used as a basis theme in the argument presented to the United States Supreme Court in 1971 to support a finding by the Court that the death penalty was a "cruel and unusual punishment."

Based on the above studies, it cannot be concluded statistically that capital punishment will deter violent crimes.



Some pro capital punishment believers argue that social science cannot prove the effectiveness of capital punishment because of incomplete data and inadequate theory to interpret the data. Thus, they believe that the common sense argument should be the basis of the deterrence theory - it is common sense that people fear death more than life in prison.

Thus, if a more fearful punishment is in place, less people would dare to commit crimes.

However, for many cases, it takes an average of ten years from conviction to execution because prisoners abuse the writ of habeas corpus, which guarantees appeals of sentences and convictions in state criminal cases. Thus, some have argued that this delay breaks the cause and effect relationship and will not effectively promote deterrence. However, if the appeal process is reformed, perhaps then, capital punishment will be more effective.

In addition, the common sense argument that people have a preference for life is flawed. This argument is based on the assumption that people make rational decisions by considering all possible outcomes when committing crimes. Many crimes especially homicides are committed in heated moments.



A more surprising finding is the theory that death penalty has not only failed to deter criminals from committing violent crimes but has also been a cause of homicide. How is this possible? The most plausible reason would be the "brutalization hypothesis". Researches William Bowers and Glenn Pierce studied homicide records in New York State between 1907 and 1963 and found that the murder rate increased slightly in the months following an execution. To explain this phenomenon, they believe that state-sanctioned executions brutalize the sensibilities of society, making potential murderers less inhibited. In other words, capital punishment encourages homicide by seeming to legitimize the killing of people. Thus, the death penalty may, in fact, "lead by example."

If the above arguments are accurate, this shows that capital punishment does not serve its intended purpose of deterrence. This will leave us with only one other purpose – retribution. If that is the case, would retribution in the form of capital punishment be morally justifiable? After all, the law strives to reflect community values. This question is for you to answer.

# Homelessness and the Bail Act

Yii Vern, Phang comments on the increasing calls for tougher enforcement of Bail laws.

The Bail Act 1977(Vic) is designed to assist judicial officers in navigating the fine line between maintaining law and order on the one hand, and ensuring the safety and welfare of the community on the other, whilst recognising the rights of individuals to liberty and safety and freedom from detention without reasonable cause.

It is evidently, a difficult judgment call to make. Problems arise when bail is granted to criminals charged with serious offences who later fail to answer bail- a recent example is Melbourne underworld figure Tony Mokbel, who was absent while the Supreme Court of Victoria sentenced him to 12 years imprisonment for cocaine importation. He disappeared a few days before the trial was concluded and is (at the time of writing) a fugitive at large. In contrast, human rights issues arise when a discriminatory approach is adopted in applying Bail law upon disadvantaged persons such as homeless persons. The Homeless Persons Court Project ('HPCP'), a project of the Public Interest Legal Clearing House ('PILCH') conducted in 2004, discovered that homeless persons were often refused bail on the basis of their homeless status, based on their interviews with 50 homeless persons who had been through the bail system. The differential treatment afforded to offenders such as Tony Mokbel, who had something like an AUD\$1 million surety for his bail, and homeless persons reveal that the current Bail Act laws are discriminatory in nature and have the potential to produce unfair outcomes.

In Victoria, ABS enumerations (2001) indicate that over 20,000 people experience homelessness on any given night. According to the ABS definition, a person is homeless if he or she experiences "primary", "secondary" or "tertiary" homelessness. "Primary homelessness" refers to persons with no form of conventional accommodation; "Secondary homelessness" refers to persons who are staying in or moving frequently between temporary accommodations; "Tertiary homelessness" refers to persons who live in boarding houses or rooming houses on a medium to long-term basis. 75% of HPCP participants identified a direct causal connection between their homeless status and interaction with the Bail system. The visibility of this group in public spaces also means that they

are over policed, targeted by law enforcement officers and are thus more susceptible to the discriminatory application of law.

The two key factors in the granting bail is that there are exceptional circumstances requiring bail to be granted, and there must not be an unacceptable risk that the person won't appear for trial. The decision maker has the discretion to look very closely at all the circumstances and make an assessment of the offender's 'flight risk'. This evidently disadvantages homeless persons because their 'flight risk' would be deemed high because of their lack of a permanent address.

Having assessed all those matters, the court also considers any conditions that might be applicable to the bail applicant. These conditions are designed to help ensure that the applicant complies with his or her bail conditions. For example, a surety may be required, that is, someone who can put up a sum of money that would be forfeited if the offender doesn't appear, so therefore someone else has an interest in making sure that the offender does appear for trial. This obviously poses a great barrier to obtaining bail for example, to a homeless person who is arrested for begging. The maximum sentence for a charge of begging under the Summary Offences Act is a year imprisonment.

Homeless defendants who are imprisoned face further disadvantages. Parole is denied until a suitable parole plan is provided; such plans must include suitable accommodation. Although in 1991 the Bail Support Program was introduced to the Melbourne Magistrates' Court in an attempt to address the lack of an address obstacle in obtaining bail, while its implementation of the Program represents a positive and much needed development, its effectiveness is limited by the lack of available appropriate accommodation. For example, places in crisis and short-term accommodation services in Victoria can only be applied for when the applicant is in a position to move in to the accommodation on the day of the application (i.e. when bail has been granted). This leaves bail applicants who are hoping to secure crisis or short-term accommodation in a 'catch 22' situation. The inequitable outcome is that those who are homeless are often incarcerated for longer than non-homeless offenders.

The Victorian Law Reform Commission ('VLRC') published a Consultation Paper on review of the Bail Act during the second half of 2005. The Homeless Persons Legal Clinic ('HPLC'), a PILCH initiative representing the interests of homeless persons, published a submission in response to the Paper.

The overriding issue raised by the submission is that the unfair outcomes generated by the application of the Bail Act to persons experiencing homelessness are in breach of Australia's obligations under international human rights law. Under the International Covenant on Civil and Political Rights (ICCPR), Australia has a continuing obligation to respect, protect and fulfil the norm of non-discrimination. Additionally, under the International Covenant on Economic, Social and Cultural Rights (ICESR), Australia must act to respect, protect and fulfil human rights. Where the application of the Bail Act discriminates against persons on the basis of their homeless status, the Act is in breach of the Victorian government's obligation under article 26 of the ICCPR to protect all persons from discrimination and a further obligation under article 28 to treat persons equally before the law. The Submission recommended that the Bail Act should be amended to include an overarching and clearly stated principle of non-discrimination, that would form part of a statement of purpose that underpins the legislation and address the unfair outcomes for persons experiencing marginalization and disadvantage, including homeless persons.

The Submission noted that discrimination against homeless persons is largely due to the severe shortage of available and affordable accommodation in Victoria. It argued that the Victorian Government has failed to provide adequate housing, and thus the Bail Act provisions should address the underlying cause of the offending behaviour, which is a consequence of the status of homelessness. It becomes necessary in the context of homeless persons, to be aware of the consequences of rigid adherence to a strict 'tough on law' approach-it would further exacerbate the discrimination against homeless persons and does not address the underlying causes of their offending behaviour, which is their homeless status.