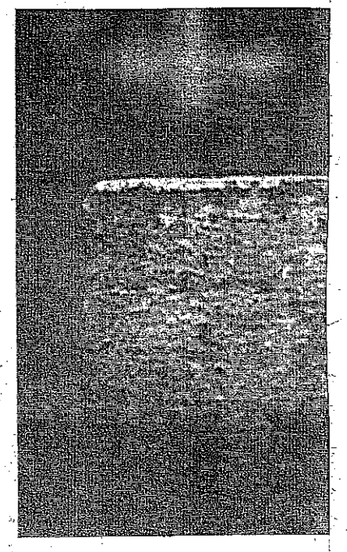
THE QUALITY OF MERCY

In 2006, Flinders University Law School graduate Kellie Toole spent three months working with Reprieve Australia, volunteering through legal aid work to assist death row prisoners in Texas. She shares her experiences with **Luke Stegemann**.



Kellie Toole first heard mention of Reprieve when doing a Criminal Law project at Flinders University. Unable to act at the time, she filed the information about the USA internships for future reference. Three years later, having completed her degree, she made what she considered a moral decision, in order to stamp her own career in law with actions that were compatible with the values she held most closely, and decided to take on the challenge of a three-month internship.

Founded by Nick Harrington in Melbourne in 2001, Reprieve Australia is the local branch of an international NGO established to provide effective legal representation and humanitarian assistance to impoverished people facing the death penalty, and to raise awareness of the use of the death penalty around the world. The organisation was founded by renowned British lawyer Clive Stafford Smith, perhaps best-known for his recent defence of the legal rights of prisoners incarcerated in Guantanamo Bay.

Since its inception, Reprieve Australia has offered internships to young Australian lawyers wishing to contribute to this vital cause, while at the same time giving them invaluable practice in the very real world of the southern states of the USA's death row. The Reprieve internship program places volunteers in capital defence offices in the United States where they work either assisting with the representation of impoverished defendants facing execution, or on research and litigation directed towards systemic reform. Such an experience is difficult to describe, beyond quite obviously being life-changing.

These internships are not for the faint of heart. Quite apart from the often distressing nature of the work, interns may be asked to work up to 80 hours a week and often through weekends at times of high demand, such as during capital trials. Tasks can range from spending days at a time at a photocopier, to ferrying clients' family members to death row to visit their loved one, to providing courtroom assistance in a capital trial. Since it began, the hours worked by Reprieve volunteers equates to a phenomenal 15 years of full-time work, offered voluntarily.

Once she decided she wanted to carry out the internship, the hardest part of getting onto the program, Toole explains, was not the selection interview, but overcoming the American immigration process. "Getting the visa was tight. When you want to go there for three months, working on a volunteer basis, to essentially challenge something which is a fundamental part of American law, politics and culture – they make you jump through some hoops." Bizarrely enough, the visa was finally granted under the category of "cultural exchange".

Her final interview was conducted by Richard Bourke, an Australian based in Louisiana, and took place literally in the middle of Hurricane Katrina: "To be interviewed by him at the same time as he was shouting out evacuation orders to people gave me an early warning of the sort of conditions people work under."

With financial support from Flinders University, Fisher Jeffries and the Law Foundation, Toole set off. Having arrived and settled into rudimentary accommodation in Houston, she began the daily grind of working through case material. While the experience is an adventure in the broadest sense of the word, it is by no means all glamour or excitement. "It is made very clear that you are not there to look at people on death row as if it were a zoo," she explains. "There is the possibility that some interns might just spend three months photocopying. It is not about you, or your skill development, or your career development. It is about doing whatever needs to be done, doing the grunt work."

Most of her work involved what was known as "digesting" – taking the hard copy records and typing them up – medical, police and prison records, social background reports, everything. Having such close scrutiny of case material allowed Toole to have a better understanding of both deficiencies and injustices. "I think it (the Texan legal system) actually is set up to be a fair system, as evidenced by the fact it takes years to reach conclusion. Everyone is entitled to a court-appointed attorney, and there are extensive appeal procedures. There is both the state and federal jurisdiction to work through, so there are ample opportunities for fairness and balance. The reality, however, is that the application of the law is not fair." By way of example, Toole cites the case of her Director in Houston, Dana-Lynn Recer, a woman who had spent 15 years doing only death penalty work in Louisiana. In Texas she was not allowed to be registered as a court-appointed death penalty attorney, so all her experience was not available to those on death row. She had no trouble practicing in Louisiana but her sheer commitment to helping condemned prisoners meant she was not given room to move in Texas. Those who are appointed, Toole claims, are often people with no passion or commitment, thereby making eventual conviction of the prisoner much easier.

This goes to the heart of Texas' very pro-death penalty population. Not only are they strongly in favour, but "the idea of Australians going over there and campaigning against the American system… we faced some real opposition, some real "How dare we?" One night in a bar we were talking to some guys about what we were doing and when we explained, there was a chill in the air and they said, "I don't know how you can live with yourselves." It was said with such a threatening undertone, it was the only time I felt seriously in danger in Texas. On another occasion I was at a symphony orchestra performance and during the interval was having a pleasant chat with a woman, until I said what I was doing in Texas, and I was just frosted out. It was the end of the conversation." The underlying message is twofold: how dare you, as a foreigner, question the way we do things here, and secondly, how dare you, no matter who you might be, question a practice that has a profoundly religious underpinning.

Despite the very broad public support for the death penalty, there is a hard core of committed anti-death penalty campaigners in the USA, most of them opposed for religious reasons. With such an issue, as with so many others, religion cuts both ways - strongly in favour and vehemently opposed to capital punishment. Although Toole parts ways with the Right-to-Life campaigners on many fronts, she wholeheartedly respects their highly effective prison visits and support networks.

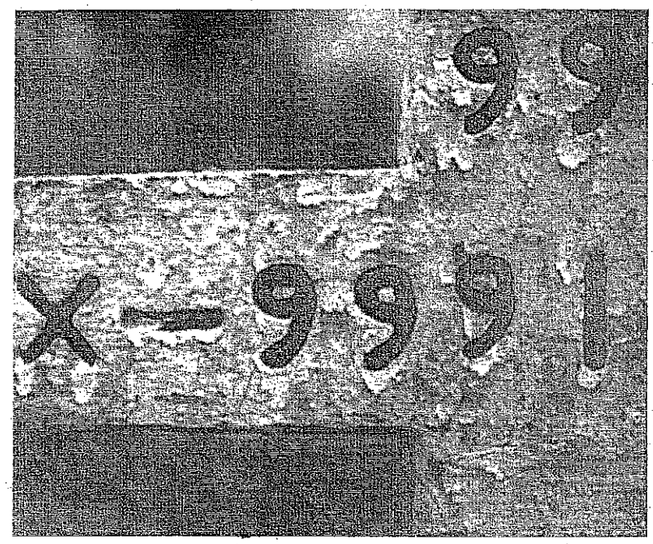
Change, though, may be slow in coming. Part of Toole's administrative work took her through boxes of old archives, including letters appealing for clemency written to then Texan Governor George W. Bush, often outlining serious cases of injustice, wrongful conviction and false evidence. To concede errors in the system, however, would be to open a Pandora's Box of further appeals and questioning of the way justice is administered, so in many cases the executions went ahead despite serious reservations, rather than risk calling the validity of the system into question. When Hollywood celebrities campaign against the death penalty, Toole explains, they are also given very short shrift in Texas. In fact, she says, it is almost counter-productive, so strong is the opposition to the idea of outsiders changing the state's legal system. "We don't want these Hollywood types telling us who we can and cannot execute."

Given the average cost of some US $5 million per execution – once the entire process is complete from arrest to execution – one suspects Americans might be swayed by the economic argument. Quite the opposite, Toole explains – the high cost only encourages the argument that executions should be carried out quicker, reducing avenues for appeal and therefore time spent in prison prior to execution. That said, the economic line does hold more sway than any humanitarian argument.

Yet she is quick to point out that despite the great levels of support, there are many Texans opposed for religious reasons, and very committed local lawyers too. However, she feels that the high level of support is fuelled, at least in Texas, by the proximity of Mexico and the fear of Mexican immigrants, perceived largely as violent criminals. "The racism against Mexicans is really full-on, far more than that against African Americans. The fear of Mexicans is amazing, and they are widely blamed for crimes and a range of social ills. There is a lot of fear and hatred."

While Toole is totally against capital punishment, she admits many of those on death row are accused of truly horrific crimes. Yet she knows it is not up to her to judge. While she was in Texas there was only one case of a prisoner facing execution at Huntsville (where all executions are carried out) – a man on the capital charge of "murder for hire". Toole worked on his case, doing research into precedents and helping draft some of the clemency appeal documents. She was present while his lawyer conducted telephone conversations with the man on the day leading up to his execution. It was a surreal experience, she recounts, listening to how discussions centred on light topics such as the breakfast menu and the ingredients of vegetable juice. But as Toole asks with chilling simplicity: "What do you talk about to a man who is on his way to be executed?" The family, naturally enough, were not present to support the prisoner at the time of his execution, having been amongst the original victims of the crime for which he was convicted and executed, despite never conceding his guilt.

Death row prisoners often depend for company on pen pals from around the world. Some take the connection even further: bizarrely, Toole describes a coterie of German women who move from Germany to Livingston, Texas in order to marry these death row inmates. "These guys," Toole says, "certainly do not want for female attention, and German women seem to be uppermost. They're right in there, and have a reputation. It was inexplicable to me. Some of them are plain odd, and go on TV and say all sorts of stupid, damaging things while appeals processes are in place – just getting publicity for themselves when obviously you have to be extremely careful about what you say." In some cases, one is unsure whether to laugh or cry: on a visit to death row, Toole had conversations with three prisoners, one of whom, obviously mentally unhinged by the experience, could not work out why his marriage – begun while on death row, and therefore never allowing physical contact of any sort – had failed. "His perception was so skewed by living on the row, that he could not see why being a death row prisoner was an impediment to a happy marriage."



Huntsville, Texas: an X on the gravestone indicates an executed prisoner whose body was unclaimed by any family

Kellie Toole

In terms of her opposition, Toole makes an interesting point: "Executions are nearly always conducted at midnight, which I always think is odd, when people in favour claim everything is totally above board. If there is nothing wrong with it, why does nearly every country do it under cover of darkness? It's as if the act were shrouded in shame, which I think it should be, as it is shameful behaviour." Another curious aspect to capital punishment that Toole often confronted Americans with was to ask them to look at those countries with which they share this passion for the death penalty: China, Iran, North Korea, Iraq – in short, most of the so-called "axis of evil" are, in this case, bedfellows of the United States. And yet, she found most Americans genuinely shocked to see they shared this in common with their "enemies". This argument – just look at who some of your bedfellows are – she found was the best way of convincing Americans they might want to revise a practice so many take for granted, and find quite acceptable.

The experience of working in Texas for three months has left her far better able to cope with stress and to put any day-to-day problems into real perspective. "Now I can face any problem and think: "Well, nobody's going to die." That was not the case while working for Reprieve in Texas."

For further information on the work of Reprieve Australia:

www.reprieve.org.au
Kellie Toole - 0407 320 389
kellie_toole@yahoo.com.au

Other websites of interest:

www.gracelaw.org/
www.tdcj.state.tx.us/stat/deathrow
www.deathpenaltyinfo.org/