



‘Upholding the Cause of Civilization’: The Australian Death Penalty in War and Colonialism

Mark Finnane

Griffith University, Australia

Abstract

The abolition of the death penalty in Queensland in 1922 was the first in Australian jurisdictions, and the first in the British Empire. However, the legacy of the Queensland death penalty lingered in Australian colonial territories. This article considers a variety of practices in which the death penalty was addressed by Australian decision-makers during the first half of the 20th century. These include the exemption of Australian soldiers from execution in World War I, use of the death penalty in colonial Papua and the Mandate Territory of New Guinea, hanging as a weapon of war in the colonial territories, and the retrieval of the death penalty for the punishment of war crimes. In these histories, we see not only that the Queensland death penalty lived on in other contexts but also that ideological and political preferences for abolition remained vulnerable to the sway of other historical forces of war and security.

Keywords: Death penalty; Queensland; abolition; colonialism; war crimes; Papua New Guinea.

Introduction

The death penalty as a judicial sentence was abolished in the Australian state of Queensland by legislative amendment to the *Criminal Code Act 1899* (the Criminal Code), proclaimed on 31 July 1922. Statutory abolition of the death penalty in Queensland is an achievement worth remembering—the first in Australian jurisdictions and the first in the British Empire. As an early abolition, the Queensland one was also noteworthy for another reason: its permanence. As examined elsewhere in this collection, the failure of a state to legislate abolition for all offences leaves open the possibility of reintroduction (Pascoe and Novak 2022).

Yet, revisiting Queensland’s abolition in its broader context suggests that there are grounds for seeing it as a partial abolition. The Queensland death penalty did, in fact, have an afterlife of some consequence that will be addressed in this article. Queensland, as a former colony of the British Empire and then a state of the Australian Federation, played a particularly important role in the development of Australia’s formation as a subject of international law. In the history of Australia’s sub-imperial role in the south-west Pacific, Queensland provided both political impetus and legal frameworks for the Australian enactment of its role as what Cait Storr has characterised as an *imperium in imperio* (Storr 2018). This is highlighted in the influence of Queensland criminal law on the various colonial administrations developed by Australia in the region. In this respect, the story told here is exemplary of the process by which British and European colonial administrations left a penal legacy of imprisonment and the death penalty in their wake (Bernault 2003; Singha 2000).

Therefore, instead of seeing the Queensland abolition as a summit achievement, there are reasons for considering it an occasion highlighting the contradictory and unresolved cultural and penal politics of the death penalty in its geopolitical context. The Queensland death penalty, as originally legislated in the Criminal Code, survived beyond 1922—not in the domestic jurisdiction of Queensland but adopted as the formalised and unamended code of law in Australia’s three external territories of Papua,



mandated New Guinea and mandated Nauru. This historical phenomenon—the adoption of the Queensland Criminal Code as the criminal law of these territories—was the means by which the Queensland death penalty survived its abolition through the history of Australia as colonial power (Papua) and international legal trustee (New Guinea and Nauru). Nothing summarises this reality better than the notices appearing in the official *New Guinea Gazette* throughout the 1920s and 1930s of certificates of execution under the authority of the Queensland Criminal Code as it had been adopted first in Papua and after 1921 in New Guinea. Yet, Queensland was also the home jurisdiction of Australia's first atrocities commissioner and later chair of the Tokyo International War Crimes Tribunal, Sir William Webb, seconded from his role as chief justice of Queensland (1940–1946), and who then presided over the award of the death penalty to convicted war criminals. It was also the home of numerous Labor political representatives who formed part of the Commonwealth legislature enacting the Australian *War Crimes Act 1945* that authorised the death penalty for war criminals convicted in Australian courts convened to try B and C Class suspects.

These are the non-domestic histories of the Australian death penalty in the 20th century that deserve recalling for what they may signal about the conditionality of jurisdiction and ethical judgement. They highlight the instability of abolition and its vulnerability to the play of historical forces that always threaten a revival. These histories also point to the importance of considering the death penalty's contextual and situational meanings, and particularly of the communicative function that informs the politics of both abolition and retention (Garland 2010). These generally forgotten histories of the Australian death penalty as a colonial legacy in the Pacific supplement and qualify the existing literature on the death penalty in Australia (Adams 2009; Anderson 2020; Jones 1968; Lennan and Williams 2012; Strange 1996).

In developing this account of the afterlife of the Queensland death penalty, I address briefly the Queensland Parliament's 1922 legislative enactment of abolition, before turning to an early instance of selective prohibition of use of the death penalty by the Australian Government in World War I. This determined stance of dominion autonomy in the face of the British Imperial Army's preference for the death penalty as a tool of military discipline stands in contrast to the Australian Government's retentionist position in its emerging colonial empire in the 1920s. The adoption of the Queensland Criminal Code for the civil administration of Papua and New Guinea continued into World War II as a means by which the military administration would deal with perceived rebellious or unreliable indigenous peoples of those provinces. In the final section, I consider the context in which a nominally abolitionist Australian Labor Government legislated the use of the death penalty for the conduct of war crimes trials in the later 1940s. In conclusion, I suggest that Australian uses of the death penalty in its colonial and wartime administrations were part of a significant barrier to abolition for much of the 20th century. Abolition in Queensland turned out to be something less than that for those brought into the sphere of Queensland and perforce Australian dominion.

Queensland Abolition

The Queensland Criminal Code was enacted in 1899, predominantly a product of the endeavours of the then–chief justice Sir Samuel Griffith. Codification was an opportunity to systematise the definition of criminal offences and the penalties applicable in a modern system of law. The Criminal Code was influential, within Australia and beyond—in the Pacific and African colonies of the British Empire (O'Regan 1988: 103–21). It affirmed the death penalty as the sanction for the most serious crimes. But, while it continued to be awarded as a mandatory penalty for murder and carried into executions (20 between 1899 and 1913), the future of this punishment was already being called into question in the Queensland Parliament.

More than 50 years ago, the history of this first abolition in Australia and the wider region was examined closely by legal historian Ross Barber (Barber 1967, 1968). Central to the story is the familiar role of dedicated activism by a small number of protagonists. However, what is striking in the Queensland abolition is the folding of the cause into the wider progressive platform of an emergent Queensland Labor Party, so that the ethical force and emotional colour of an abolitionist campaign are notably absent from the story of successful abolition in 1922. Abolition of the death penalty (and corporal punishment) was just one of eight 'Abolitions' in the 'Fighting and General Platform' of the Australian Labor Party adopted at its Sydney conference in 1919 (*Worker* 1922: 24). It was the last of the six 'Social Reform' objectives, following 'Endowment of motherhood'. When it came to Queensland in 1922, abolition of the death penalty was made possible by the prior achievement of one of the other 'abolitions', of the Queensland Legislative Council (the upper house), resulting in the only unicameral parliament in Australia.

The contrast with the intense abolitionist campaign of the 1960s in Victoria, the last Australian jurisdiction to carry out an execution, is striking (Burns 1962; Jones 2006; Richards 2002). Of course, abolition of the death penalty as a party political objective was not the only condition of success, as the barrier to equivalent success in New South Wales (NSW) demonstrated (Strange 2022). Rather, the privileged power of a radical Labor government in postwar Queensland enabled it to clear the hurdles that faced abolition elsewhere—with a minimum of parliamentary trouble and little public opposition. We might ask how much this success owed to some underlying features of Queensland as a settler society, secure in its membership of an

Australian federation protected by the White Australia Policy, a race-based immigration regime that aimed to exclude the ‘coloured races’ (Bashford 2002; Brawley 1995; Markus 1979; Price 1974). After all, the first objective of the Australian Labor Party in its 1919 platform signalled the kind of society that this radical government in Queensland wanted to see: ‘the cultivation of an Australian sentiment, the maintenance of a White Australia, and the development in Australia of an enlightened and self-reliant community’ (*Worker* 1922: 24). The following section highlights this context by considering some of the other legacies of Queensland law and abolition and of the broader Australian story.

The Australian Exemption from the Death Penalty

On the eve of World War II, John B Steel, secretary of the Howard Prison Reform League (NSW), urged conservative Australian prime minister Robert Menzies to abolish capital punishment in all territories over which the Commonwealth had jurisdiction. Earlier in 1939, while Menzies was still attorney-general, the League had met with him to discuss the same request. Steel now appealed to a precedent of some moral weight: ‘we hope that you will confer this altruistic boon on Australia, as was done when the decree was issued that “no Australian Soldier shall be flogged or executed”’ (Steel, 22 May 1939).

What was Steel referring to? Under the *Defence Act 1903*, the penalty of death awarded as a result of a court martial could not be ‘carried into effect until confirmed by the Governor General’ (s 98). Under Australian constitutional practice, this effectively meant that the death penalty in the Australian armed forces was subject to the agreement of the Federal Cabinet. It is unclear the extent to which this statutory requirement was a response to the popular outcry over the trial and execution of Breaker Morant during the Boer War—for what would later be known as a war crime: the shooting of civilians (Wilcox 2010). What is not in doubt is the importance of this provision in the later conduct of military justice in World War I. Alone of the imperial and dominion forces comprising the British Expeditionary Forces during the war, the Australian Government insisted that no soldier would be executed as a consequence of a death penalty awarded after conviction at court martial for offences against military law or discipline (Finnane and Smaal 2020; Wilson 2016, 217–222).

The government’s opposition to the use of the death penalty for Australian soldiers persisted beyond the change in political complexion following the Labor split over conscription in 1916–1917. Further, it was maintained in the face of very persistent pressure from Army Command. More than 120 Australian soldiers were sentenced to death at court martial during the war (1914–1918), but not one was executed in consequence (Finnane and Smaal 2020; Lambley 2012) Three aspects are worth noting about this assertion of Australian distinctiveness.

First, the government’s refusal to give way was, arguably, a dimension of Australian nationalist assertion of autonomy within the British Empire. In this respect, the Labor complexion of government during the first part of the war and the survival in leadership after the split of the assertively nationalist prime minister William Morris Hughes were influential factors in the opposition to the death penalty.

Second, the rationale for the government’s action was likely informed by the twofold character of Australian military recruitment—enlistment and overseas service were voluntary, and future recruitment might be threatened by the news of execution of Australian soldiers while in service.

Third, despite the ban on the execution of serving soldiers, this was (for the time being) not a principled stand against the application of the death penalty in civil law. This was clarified in 1918 when two soldiers were executed after their convictions at regular criminal trial for the murders of women in Melbourne in 1917. One was a wounded Gallipoli veteran, saluted by a gathering of soldiers outside Melbourne Gaol at the moment of his execution. The Victorian Government was unmoved by protests against these executions (Robinson 2014: 239–245; *Warnambool Standard* 1918: 3).

Thus, although impressive as a stance against the conventional military wisdom of the deterrent value of capital punishment, the Australian Government’s policy on the use of the death penalty in wartime fell short of principled abolition. Rather, it was a context-shaped reference to the functionality and effectiveness (or lack thereof) of capital punishment and left the way open for the deployment of the death penalty against other people and in other circumstances.

The Queensland Death Penalty Continues

In the days when a letter to a prime minister might produce not only a personal reply but also action to follow up a policy suggestion, John B Steel’s appeal in 1939 prompted the Federal Government to inquire regarding the opinion of the administrators of Australia’s territories on his suggestion for the abolition of the death penalty (Territories - Abolition of capital

punishment, 1927). From Port Moresby, the formidable lieutenant governor J. H. P. Murray announced that while he was personally inclined to agree with arguments against capital punishment in England and Australia, the circumstances of Papua—an Australian Territory originally annexed by Queensland in 1883—were different. Murray could not, he said, do better to explain the need for retention than repeat what he had told previous Labor prime minister J. H. Scullin in 1930:

In Papua the position of the European is that of a small garrison, upholding the cause of civilization among a more or less hostile or indifferent population of primitives; and obviously the lives of this small garrison and the honour of the women must be protected. And we believe that the only adequate protection is death. A failure to afford an adequate protection would jeopardise the cause of civilization, and might bring about the horrors of a racial war. (Murray 1939)

Murray's 1930 defence of the death penalty was prompted by the Labor Government in Canberra putting into play the party's policy of abolition (Beasley 1931). However, he used the sentence sparingly, not once between 1916 and 1930, and only twice in the 1930s—this was despite the statutory move to reintroduce the death penalty for rape of a white woman, a move that replicated similar action in a number of African colonies (Inglis 1974; Nelson 1978; Killingray 2003, 110). By contrast, in the Mandate Territory of New Guinea (effectively under Australian control since its takeover from Germany in 1914), the death penalty was used frequently in the 1920s and 1930s as Australian administrators struggled to control the villages. From Rabaul in 1939, the administrator (W. Ramsay McNicoll) also invoked a 1930 policy statement by an earlier administrator: 'the Territory is not to be compared with settled and civilised countries, and standards to be adopted must be sought by comparison with similarly constituted communities'. New Zealand had been criticised in the League of Nations for 'the lack of firm handling of the situation that arose' in Samoa, its mandated territory. 'If the death penalty is abolished I am not prepared to suggest what the ultimate result will be', the administrator told Canberra in 1930 (McNicholl 1939).

There were two other Pacific territories: Nauru (another Mandate Territory) and Norfolk Island. The small, predominantly British population of Norfolk Island may have welcomed their administrator's agreement with the cause of abolition—certainly, the administrator conveyed no sense of local sympathy for retention (Rosenthal 1939). However, the report from the administrator of Nauru was a shock in Canberra. According to the administrator F. R. Chalmers, 'this territory has adopted the Criminal Code act 1899 of Queensland which in the year 1922 was amended providing for the abolition of capital punishment. There is, therefore, no death penalty in Nauru.' 'Is this correct?', asked a departmental officer in the External Territories. 'No', affirmed another (Chalmers 1939).

Upon inquiry by the law officers, it emerged that the death penalty was still available in Nauru, although it had not been used since 1922. The legal position was that Queensland's abolition, achieved by amendment to the Code in July 1922, followed by a year the date of adoption (1 July 1921) of the Criminal Code for use in Nauru. On being advised thus by Canberra, the administrator requested that an abolition amendment be drawn up (Strahan 1939). By this time, war had been declared, and the success of John B. Steel's letter provoking policy discussion about the death penalty in Australia's Pacific territories came to nothing.

In this history of messy administration, we can see reflected the practice of capital punishment in the interwar years as an instrument of colonial control, although it was exercised with a very high degree of discretion. This followed early endorsement by the Australian Government of its use in colonial settings. In 1907, a liberal prime minister Alfred Deakin signed an ordinance that amended the Queensland imported code to provide for the reintroduction of public execution, a practice endorsed into the 1940s as a pedagogic tool for the pacification of the natives (Papua. Criminal Code Amendment Ordinance of 1907. No. 4). For the most part, by the interwar years, the longstanding pacification strategies of governor Murray in Papua had diminished use of the death penalty as a tool of administration of indigenous Papuans. By contrast, the Australian administration of Mandate New Guinea was much harsher, speaking to a determination to exercise control over New Guinean peoples whose earlier experience was of German colonial masters (Nelson 1978; Sack 2001; West 1968). From the island of New Britain in 1933, a district officer justified the continuing use of execution as a tool of government, reactivated after the moratorium imposed by the Scullin Labor Government in 1929–1930. In one case, two men had been executed before some 750 natives gathered to witness the event 'near the spot where they committed murder'. Elsewhere, an execution had taken place in a village where 'nearly a thousand natives were again mustered, and addressed'. In the past, he reported, 'the areas from which these executed men came from has [sic] given unending trouble, and peaceful patrols have availed little, but I do think the execution of the murderers on the spot has done much to make these natives fall in with the wishes of the government' (Ellis 1933). This is the colonial context in which we see a much more frequent use of the death penalty through the 1920s and 1930s. Further, in this practice, the law being deployed was that literally imported from Queensland via the Australian colonial administration in Papua.

A colonial respect for due process in administration of a trustee territory was evident in the bureaucratic organisation of execution and its aftermath. We know this, due again to the tireless John B. Steel, undeterred by the outbreak of war, writing again on behalf of the Howard Prison Reform League to the prime minister on 27 September 1939:

It is pretty rough on the natives that their country should be taken from them, many of their people murdered, and then, when they retaliate, subject them to a trial that they don't understand, and punish them under white man's savage, brutal codes. (Steel, 27 September 1939).

The 'savage, brutal codes' had been imported from Queensland and gave legal shape to this process. Each event was duly publicised in the official *New Guinea Gazette*. The certification of a completed execution was signed by an attending medical assistant as well as prison functionaries, appearing as a Notice in accordance with section 664 of the Criminal Code (Queensland, Adopted). In this way, the Queensland death penalty survived its 1922 abolition, justified by the demands of governing a 'population of primitives', as Murray put it (Murray, 1939). This continued an earlier Australian practice of using the death penalty as an instrument of civilisation (Anderson 2015; Connors 2015, 2020; McGuire 1998).

The Australian Death Penalty in War

The interwar record of Australia as a colonial power in the Pacific demonstrated the continuing attachment of Australian authorities to the effectiveness of capital punishment in the service of government of a particular kind of people. This is the background against which we see—in stark relief—the use of hanging in these same territories in World War II.

The position of the indigenous peoples of Papua and New Guinea during the Pacific War was unenviable. Classified as neither citizens nor aliens, their status as civilians in a theatre of very violent war rendered them especially vulnerable. Whose side were they on? Whose side should they be on?

Over a period of more than a year in 1943–1944, at least 22 Papua New Guinea civilians were executed under Australian jurisdiction, their fate determined by the decision of the commander of Australian military forces in New Guinea, Lieutenant Colonel Edward (Ned) Herring. By 1945, when the matter came to public notice in Australia following representations from a missionary leader, Herring was back in Australia following his appointment as Chief Justice of Victoria. The trial and execution of these people were not carried out under military law but under Australian civil law, which was the responsibility of the army after the collapse of the civil administration in February 1942. In that context, offences that came to notice might be the subject of prosecution under either the Queensland Criminal Code (as adopted in 1921) or the *Commonwealth Crimes Act*—both prescribed penalties of death for a range of offences, including treason, deemed a relevant charge in a number of cases brought against Papua and New Guinea people accused of assisting the Japanese forces (Dunn 1944). Under the conditions of wartime emergency, the relative autonomy of military command rendered civilian authorisation of prosecution and confirmation of punishment null. The confirmation of death penalty sentences became the prerogative of the military commander in New Guinea. When, in 1945, the government learned the reality of what had happened, it took the view that there had been a cover-up.

The 1943–1944 trials and executions came to notice in the course of an approach by J. W. Burton of the Methodist Church direct to prime minister John Curtin regarding late war trials of Papua and New Guinea civilians sentenced to death (Chalk 1986; Jones 2006; Nelson 1978). In contrast to what was seen now as an earlier cover-up, from late April, political leaders were alert to the pending executions of men sentenced since the Australian resumption of civil administration in February. The minister for territories E. J. Ward ordered that no executions were to take place, directing instead a review of the trials that had led to death sentences. The Australian military commander had confirmed the death sentences of seven of the men tried for a range of crimes, including murder and rape, but the sentences were never carried out. Ward took the matter to the Federal Cabinet, which reaffirmed in early June the necessity for Commonwealth Government approval of any death sentence. Despite some grumbling from the army, and even a suggestion of military resistance, the government order stood firm and the 1945 death sentences were commuted (Chalk 1986; *Death and Other Sentences* 1945).

This record of late war clemency did not address the circumstances under which Australian troops had earlier executed Papua and New Guinea civilians in 1943–1944. The wartime executions had a political afterlife when they were aired by Australian Federal Labor politician Barry Jones in 1978 (Jones 2006). The public airing of the reality that a Victorian Chief Justice had a wartime record as executioner in the nation's colony and mandated territory perhaps played some role in consolidating a commitment to abolition that followed in the years to 1985. However, the historical significance of the wartime executions of Papua New Guinea civilians also highlights the attraction of the death penalty in a time of war emergency, overriding the political preference of interwar years for reduction of its use, if not complete abolition. A military inclination towards capital

punishment as retribution and deterrent was at the heart of the practice—albeit, as we have seen, a preference for capital punishment that had been resisted strongly when applied to Australian soldiers in the field since early in the century. Contextually, the wartime executions seem inseparable from the continuing colonialist perception of Papua and New Guinea civilians as primitives who would only respond to the harshest lessons, in the last resort best taught by the public display of hanging.

In the Labor Government's response to the revelations of April 1945, we see evidence of the gulf that had emerged between progressive liberal thinking on capital punishment and longstanding attachment to the value of the ultimate sanction. Yet, only so much can be made of the transition from retentionist to abolitionist thinking in Australia at this time, as we see in the subsequent approach to war crimes.

War Crimes and the Death Penalty

The most extensive use of the death penalty under Australian criminal law in the 20th century was that exercised against (predominantly Japanese) war criminals convicted under a Commonwealth statute: the *War Crimes Act 1945*. I exclude from this consideration those convicted and sentenced by the international War Crimes Tribunal, which was chaired in Tokyo from 1946–1948 by a Queensland and then–Australian high court judge, Sir William Webb. Those trials were undertaken under international mandate. The Australian trials of B and C Class war criminals were undertaken within the legislative framework of Australian criminal law, modified for the purpose.

The trials were a hybrid of courts martial and standard criminal law procedure; however, they were conducted by military officers delegated for the task, not all of them legally qualified. Most were held outside the Australian continent (only three were held in Darwin) but typically in Australian territory (the great majority in Rabaul, in the Mandated Territory of New Guinea). The 300 trials of 807 men resulted in approximately two-thirds being convicted, with the most recent and authoritative account suggesting that 226 death sentences were awarded (Fitzpatrick 2016).

The trials have received considerable and detailed attention in recent years, in at least two major collaborative projects as well as doctoral research (Aszkielowicz 2012; Carrel 2005; Fitzpatrick 2016; Fitzpatrick, McCormack and Morris 2016; Oswald and Waddell 2014; Pappas 1998; Wakeling 2018; Wilson et al. 2017). Relatively little attention has been paid to the history and significance of the use of the death penalty as a punishment outcome. However, Fitzpatrick's research, as well as recently digitised Australian archive files, enable us to identify some of the tension between abolition and retention on which I have focused here.

As we have seen, abolitionist sentiment had made its way into Labor Party policy platforms with some considerable effect between the wars—on the one hand, expressed in Queensland abolition and, on the other, in the refusal of the Scullin Labor Government to endorse use of the death penalty in Papua and New Guinea. In the conditions of wartime, and seemingly without civil authority being informed during a period of Labor government, civilians had been executed in New Guinea. In 1945, Labor in government faced a new challenge. As the war drew to a close, in June 1945, the United Kingdom by Royal Warrant established a procedure for trial of war criminals in Germany. With the end of the Pacific War in August, the Department of the Army and the Attorney-General's Department began to explore options, including a possible Australian instance of the Royal Warrant to conduct trials. Legal uncertainty over jurisdiction and constitutionality, and the possible jeopardy to Australian prosecutors of legal action by enemy aliens, prompted the decision in early October to enact the Australian *War Crimes Act 1945*. Importantly, legal considerations included the fact that the Royal Warrant authorised the death penalty, a measure that Australian legal advisers (probably George Knowles in the Attorney-General's Department) felt warranted legislation rather than prerogative declaration by the governor general (Royal Warrant 1945). Preparation of the legislation was hasty, so rushed that the Australian commander-in-chief general Thomas Blamey knew nothing of it, inquiring as late as 3 October what he was to do with 14 Japanese prisoners suspected of war crimes (Blamey to Forde, 1945).

In primarily following the procedures of the United Kingdom Royal Warrant trials, the war crimes legislation incorporated the death penalty (by hanging or shooting) as one of the punishments on conviction (*War Crimes Bill and Regulations 1945*). That meant that the abolitionist Labor Government was responsible for mandating a new use of capital punishment. The government was acting under very strong public pressure, particularly as the end of war and return of soldiers aggravated popular outrage at the treatment of Australian prisoners of war. Fitzpatrick has suggested that additional support for the death penalty came from Webb, who told the minister for army in January 1946 that 'it would be wrong to assume that we must exercise the same meticulous care with sentences imposed on war criminals as we would with sentences imposed on our own people' (Fitzpatrick 2016: 330).

The haste with which the legislation was enacted in October 1945 was also demonstrated by the difficulty facing the government as it sought to finalise the arrangements in carrying through the death sentence where it was awarded. The military courts prescribed by the Act were modelled on courts martial, with confirmation of sentences and their execution reserved for the governor general who might delegate these powers (*War Crimes Act 1945*: ss. 5, 6, 11). The first regulations drafted to authorise the establishment of the military courts were completed without concluding the delegation arrangements for confirmation of sentences, especially the death penalty. By December, the matter had become urgent. The secretary of the department of army (Sinclair) urged his minister to consider ‘an authority independent of the army to be charged with the responsibility for the confirmation of death sentences’. Notably, Sinclair drew attention to the longstanding Australian practice of review by civil government of death sentences under military court martial, a practice he said was ‘swept aside’ by the Australian *War Crimes Act 1945* and regulations (Secretary Army to Minister, 6 Dec 1945).

After advice was sought from the Australian high commissioner in London regarding British procedure for confirmation, on 12 December, the commander-in-chief was delegated the responsibility to commute or mitigate sentences. However, this was not the end of the matter—the war crimes trial procedure entailed a right to petition for commutation or remission of sentence, a right taken up by many of those convicted and prompting further anxiety within the government regarding the procedures. A month later, a decision was yet to be made, in a context where numerous trials had already concluded with death sentences awarded but yet to be confirmed. The delay may have owed something to the chaotic administrative style of the attorney-general H. V. Evatt, who was inclined to think ‘that some authority, other than a military authority, should consider the finding and sentence of the court’, before a sentence of death was confirmed’ (Castieau, 14 Jan 1946). Under these circumstances, the army was directed not to confirm or carry out death sentences.

Such a delay in finalising this critical procedural matter is perhaps best seen in the context of death penalty administration in Australia, as I have discussed above. Short of outright abolition, as occurred in Queensland in 1922, abolitionist sentiment had nevertheless been evident in the insistence of Federal Labor governments on the responsibility of civil government for final decisions regarding death penalty cases. This had been the case both with respect to Australian defence personnel and the late war administration of the death penalty in Papua and New Guinea. The earlier revelations of April 1945 concerning military decisions to execute civilians in a theatre of war on Australian territory were of very recent memory in January 1946. For some days, government ministers and senior bureaucrats prevaricated over the procedure that should be followed. As late as 15 January, consideration was still being given to appointing an independent judicial authority to conduct petition reviews for advice to the army (Castieau, 15 January 1946). Yet, on 19 January, the army was advised that ‘death sentences will not be reviewed by an authority other than an authority authorised to do so under the War Crimes Act’ (Castieau, 21 Jan 1946). The resolution followed a meeting between Forde and Evatt on the same day that clearly proceeded under the pressure of time, to the neglect of other concerns about a wholly military proceeding: ‘it seems desirable that all such sentences should be reviewed and, if not commuted, carried out, as expeditiously as possible’ (Sinclair, 25 Jan 1946).

The decision to cede death penalty administration entirely to the military authority saved the Labor Government from subsequent involvement in decisions to carry out the penalty. Almost immediately, there was a public outcry when the acting commander-in-chief, lieutenant General Sturdee, authorised a significant number of commutations (Carrel 2005; Fitzpatrick 2016). His initial leniency may have owed something to his procedural correctness in putting in place suitable arrangements for the executions subsequently authorised. That was not a simple matter. The *War Crimes Act 1945* regulations provided for hanging or shooting (by firing squad) as the method of execution. However, hanging required a certain expertise—which the army found eventually for the many Rabaul executions in two majors who had served in New Guinea administration between the wars. Execution by firing squad was also a challenge to organise—it required soldiers willing to partake and having enough of them given the high numbers of executions in some locations. These administrative challenges were mirrored in the amended regulations of August 1946, which authorised alternate methods of execution where local conditions warranted. As the army explained, ‘as facilities for hanging or shooting War Criminals sentenced to death do not exist in all areas it is considered essential to empower the confirming authority to substitute the alternate punishment where facilities do not exist to carry out the sentence in the form imposed by the Court’ (Sinclair, 23 Aug 1946).

Under these arrangements, Australian legislation, enacted by an abolitionist government, authorised the most intense use of the death penalty since the convict era of the early nineteenth century. The right to petition for remission of the sentence was used widely and, to a degree, respected, evident in the commutation of a significant minority of sentences. The 226 death sentences awarded resulted in 137 persons being executed by hanging or shooting. The detailed review of the death sentences and their administration by Georgina Fitzpatrick gives some reason to consider that many in the military were profoundly unsettled in the administration of this postwar reckoning with war crimes. The final executions took place in 1951 on Manus Island, under the new Menzies government, which resumed civil review of death sentences, leading to an even higher commutation rate in a changing political environment (Fitzpatrick 2016).

Conclusion

It may be tempting to see the Australian use of the death penalty in its colonial territories as governed by an especially racist temperament, suited to a government and people wedded to the privileges of the White Australia Policy. Yet the colonial administrator Murray governed Papua almost wholly without capital punishment after 1916, in contrast to the choices made in Mandate New Guinea after 1921. Abolition had commenced in Australia in the domestic jurisdiction of Queensland in 1922, but persisted long after in other states, not only in the colonial territories. The death penalty was a weapon of government in historically circumscribed contexts—conditions that allowed both abolitionist and retentionist policy moves during the first half of the 20th century.

Abolition in some places was successful for reasons that had little to do with the marshalling of a strong social or political movement against it. It seems that the cause of abolition benefited where it was folded into a collection of progressive policies advanced by right-thinking people during a moment of political advantage. Such was the case in Queensland in 1922. As we have noted, abolition of capital punishment was just one of eight ‘abolitions’ in the Labor political platform after 1919—the platform whose first objective was ‘the cultivation of an Australian continent, the maintenance of a White Australia, and the development in Australia of an enlightened and self-reliant community’ (*The Worker* 1922: 24). In this light, we may also ask to what degree the achievement of abolition in Queensland was conditional on the security settlement in place by 1922. That state’s provincial autonomy was expressed in the drastic political intervention of abolition of the second legislative chamber and its comfort as part of a federated Australia that had earlier adopted the White Australia Policy and deported Pacific Islanders. The value of exploring these other histories of the death penalty in the colonial and wartime histories that followed the Queensland abolition is to highlight the conditions that made capital punishment still an option, when security was threatened, for use against certain colonial subjects and certain wartime enemies.

The revival of the death penalty and its exercise against those convicted of war crimes in the 1940s reminds us of the vulnerability of the politics of capital punishment in the face of popular sentiment, angry demands for justice and restitution, and calls for retribution (Ohlin 2005). In the intense intra-governmental communications that took place around the administration of the death penalty in the Australian wartime and postwar war crimes trials, we see political compromises exacted out of the stress of external expectations and internal power struggles between the military and the civilian government. Thus, committed opponents of the death penalty, like the Labor leaders of the war and postwar governments, could both force the army to disclose Australian use of the death penalty as a weapon of revenge in 1943 and subsequently give way to the necessity (as they saw it) of allowing the use of the death penalty in the postwar trials of predominantly Japanese military personnel.

Capital punishment was abolished in Queensland in 1922—the first instance in an Australian jurisdiction. However, this was far from a stepping stone along a straight path to early abolition in other jurisdictions. In ways we have explored here, the Queensland death penalty as legislated in the Queensland Criminal Code continued to play an influential role in Australian dominion in its geographic region, an instance of Australia’s role as a colonial power and international adversary in the 20th century.

Correspondence: Mark Finnane, Griffith University, Australia. m.finnane@griffith.edu.au

References¹

- Adams S (2009) *The unforgiving rope: Murder and hanging on Australia’s Western frontier*. Crawley: UWA Publishing.
- Anderson S (2015) Punishment as pacification: The role of Indigenous executions on the South Australian frontier, 1836–1862. *Aboriginal History* 39, 3–26.
- Anderson S (2020) *A history of capital punishment in the Australian colonies, 1788 to 1900*. Cham: Palgrave MacMillan.
- Aszkielowicz DM (2012) After the surrender: Australia and the Japanese class B and C war criminals, 1945–1958. PhD Thesis, Murdoch University, Western Australia.
- Barber, RN (1967) Capital punishment in Queensland. PhD Thesis, University of Queensland, Queensland.
- Barber RN (1968) The Labor Party and the abolition of capital punishment in Queensland 1899–1922. *Queensland Heritage* 1(9): 3–12.

- Bashford A (2002) At the border: Contagion, immigration, nation. *Australian Historical Studies* 120: 344–358.
- Beasley JA 14 Feb 1931: Territories - Abolition of capital punishment, NAA A518, FO112/1, f. 107.
- Bernault F (ed) (2003) *A history of prison and confinement in Africa*. Translated by JL Roitman. Portsmouth, NH: Heinemann.
- Blamey T 3 Oct 1945 and Forde F 5 Oct 1945: War Crimes Bill and Regulations NAA, A472, W28681, ff. 168, 166.
- Brawley S (1995) *The white peril: Foreign relations and Asian immigration to Australasia and North America*. 20. Sydney: University of New South Wales Press.
- Burns C (1962) *The Tait case*. Melbourne: Melbourne University Press.
- Carrel M (2005) Australia's prosecution of Japanese war criminals: stimuli and constraints. PhD Thesis, University of Melbourne, Victoria.
- Castieau GB 15 Jan 1946: War Crimes Bill and Regulations NAA, A472, W28681 ff. 51-2
- Castieau GB 21 Jan 1946: War Crimes Bill and Regulations NAA, A472, W28681, f. 47
- Castieau GB 14 Jan 1946: War Crimes Bill and Regulations NAA, A472, W28681, f. 53
- Chalk A (1986) The king's reward: The Australian Army's execution of Papuan and New Guinean 'natives', 1942–1945. PhD Thesis, University of New South Wales, NSW.
- Chalmers FR 11 Jul 1939: Territories - Abolition of capital punishment, NAA A518, FO112/1, f. 145.
- Connors L (2015) *Warrior: A legendary leader's dramatic life and violent death on the colonial frontier*. Crows Nest: Allen & Unwin.
- Connors L (2020) The theatre of justice: Race relations and capital punishment at Moreton Bay 1841–59. In *Brisbane: The Aboriginal presence 1824–1860*. Brisbane: Boolarong Press & Brisbane History Group.
- Death and other sentences imposed on natives in New Guinea, 1945: NAA MP742/1, 85/1/671.
- Dunn BJ 7 Jan 1944: Natives - Customs: A file dealing with trials, held by Australian New Guinea Administration Unit (ANGAU), for various civil offences committed by natives, 1943-1944 (March-February 1944), 1943: NAA AWM54, 506/1/4, ff. 49-52.
- Ellis G 24 Mar 1933: Territories - Abolition of capital punishment, NAA A518, FO112/1, ff. 68-9.
- Finnane M and Smaal Y (2020) Character, discipline, law: Courts martial in World War I. *Australian Historical Studies* 51: 324–340. <https://doi.org/10.1080/1031461X.2020.1741657>
- Fitzpatrick G (2016) Death sentences, Japanese war criminals and the Australian Military. In Fitzpatrick G, McCormack TLH and Morris N (eds) *Australia's war crimes trials 1945–51*. Leiden: Brill Nijhoff.
- Fitzpatrick G, McCormack TLH, Morris N (2016) *Australia's war crimes trials 1945–51*. Leiden: Brill Nijhoff.
- Garland D (2010) *Peculiar institution: America's death penalty in an age of abolition*. Cambridge, MA: Harvard University Press.
- Inglis A (1974) *Not a white woman safe: Sexual anxiety and politics in Port Moresby, 1920–1934*. Canberra: Australian National University Press.
- Jones BO (1968) *The penalty is death*. Melbourne: Sun Books in association with the Anti-Hanging Council of Victoria.
- Jones BO (2006) *A thinking reed*. Crows Nest: Allen & Unwin.
- Killingray D (2003) Punishment to fit the crime? Penal policy and practice in British colonial Africa. In Bernault F (ed) *A history of prison and confinement in Africa*: 97–118. Portsmouth, NH: Heinemann.
- Lambley DB (2012) *March in the guilty bastard*. Burleigh MDC: Zeus Publications.
- Lennan J and Williams G (2012). The death penalty in Australian law. *Sydney Law Review* 34: 659–694.
- Markus A (1979) *Fear and hatred: Purifying Australia and California, 1850–1901*. Sydney: Hale & Iremonger.
- McGuire J (1998) Judicial violence and the 'civilizing process': Race and the transition from public to private executions in colonial Australia. *Australian Historical Studies* 29: 186–209.
- McNicol WR, 14 Jul 1939: Territories - Abolition of capital punishment, NAA A518, FO112/1, ff. 121-4, 146-7.
- Murray JHP. 4 Jul 1939: Territories - Abolition of capital punishment, 1927: NAA A518, FO112/1, ff. 153-4.
- Nelson H (1978) The swinging index: Capital punishment and British and Australian administrations in Papua and New Guinea, 1888–1945. *Journal of Pacific History* XIII: 130–153.
- O'Regan RS (1988) *New essays on the Australian criminal codes*. Sydney: Law Book Company.
- Ohlin JD (2005) Applying the death penalty to crimes of genocide. *American Journal of International Law* 99: 747–777.
- Oswald B and Waddell J (eds) (2014) *Justice in arms: Military lawyers in the Australian Army's first hundred years*. Newport: Big Sky Publishing.
- Pappas CU (1998) Law and politics: Australia's war crimes trials in the Pacific, 1943–1961. PhD Thesis, Australian Defence Force Academy, Australian Capital Territory.
- Papua. Criminal Code Amendment Ordinance of 1907. No. 4, 1905: NAA A1, 1907/8942.
- Pascoe D and Novak A (2022) Holdouts in the South Pacific: Explaining death penalty retention in Papua New Guinea and Tonga. Abolition Symposium 2021, Melbourne, DATE.
- Price CA (1974) *The great white walls are built: Restrictive immigration to North America and Australasia 1836–1888*. Canberra: Australian Institute of International Affairs in association with Australian National University Press.

- Richards M (2002) *The hanged man: The life and death of Ronald Ryan*. Carlton North: Scribe.
- Robinson R (2014) *Khaki crims and desperadoes*. Sydney: Pan Macmillan Australia.
- Rosenthal C 27 June 1939: Territories - Abolition of capital punishment, NAA A518, FO112/1, f. 152.
- Royal Warrant and Regulations for the Trial of War Criminals: Action Necessary to Constitute Australian War Crimes Courts' [n.d., Sep 1945]: War Crimes Bill and Regulations NAA, A472, W28681, ff. 185-9
- Sack PG (2001) *Phantom history, the rule of law and the colonial state: The case of German New Guinea*. Canberra: Division of Pacific and Asian History, Australian National University.
- Secretary Army to Minister, 6 Dec 1945: War Crimes Bill and Regulations NAA, A472, W28681, ff. 83-5
- Sinclair FR 25 Jan 1946: War Crimes Bill and Regulations NAA, A472, W28681, ff. 26-8
- Sinclair FR 23 Aug 1946 War Crimes Bill and Regulations NAA, A472, W28681, ff. 17-18
- Singha R (2000) *A despotism of law: Crime and justice in early colonial India*. New Delhi: Oxford University Press.
- Steel JG 22 May 1939: Territories - Abolition of capital punishment, NAA A518, FO112/1, f. 157
- Steel JG 27 Sep 1939: Territories - Abolition of capital punishment, NAA A518, FO112/1, f. 12.
- Storr C (2018) 'Imperium in imperio': Sub-imperialism and the formation of Australia as a subject of international law. *Melbourne Journal of International Law* 11.
- Strahan F3 Aug 1939: Territories - Abolition of capital punishment, NAA A518, FO112/1, f. 144.
- Strange C (1996) Discretionary justice: Political culture and the death penalty in New South Wales and Ontario, 1890-1920. In Strange C (ed.) *Qualities of mercy: Justice, punishment, and discretion*. Vancouver, BC: University of British Columbia Press.
- Strange C (2022) Abolition thwarted: NSW 1925. Abolition Symposium, Melbourne, Victoria, 2021. Territories - Abolition of capital punishment, NAA A518, FO112/1
- The Worker* (1922) The Australian Labor Party: Federal platform. 16 February. <http://nla.gov.au/nla.news-article71059879>
- Wakeling A (2018) *Stern justice*. Melbourne: Penguin.
- War Crimes Bill and Regulations NAA, A472, W28681
- Warnambool Standard (1918) Albert Budd executed. 30 January. <http://nla.gov.au/nla.news-article74044157>
- West FJ (1968) *Hubert Murray: The Australian pro-consul*. Melbourne: Oxford University Press.
- Wilcox C (2010) Breaker Morant: The murderer as martyr. In Stockings C (ed) *Zombie myths of Australian military history*: 29-49. University of New South Wales Press.
- Wilson G (2016) *Accommodating the king's hard bargain: Military detention in the Australian Army 1914-1947*. Newport: Big Sky Publishing. <http://trove.nla.gov.au/version/221466738>
- Wilson S, Cribb RB, Trefalt B and Aszkielowicz D (2017) *Japanese war criminals: The politics of justice after the Second World War*. New York: Columbia University Press.

Legislation cited

- Crimes Act 1914* (Commonwealth)
- Criminal Code Act 1899* (QLD)
- Criminal Code (Queensland, Adopted) 1921* (Territory of New Guinea)
- Defence Act 1903* (Commonwealth)
- War Crimes Act 1945* (Commonwealth)

¹ This article includes extensive archival sourcing from the National Archives of Australia (NAA). Where an author of a letter has been identified, references are cited by author; other references are by title of file. Sources are cited as Author (of letter or minute), Date (of letter or minute), Title of File, NAA Citation reference, folio (page) number of PDF copy of the file. All files cited are now online at NAA (naa.gov.au).