



# Ambivalent Abolitionism in the 1920s: New South Wales, Australia

**Carolyn Strange**

The Australian National University, Australia

## Abstract

In the former penal colony of New South Wales (NSW), a Labor government attempted what its counterpart in Queensland had achieved in 1922: the abolition of the death penalty. Although NSW's unelected Legislative Council scuttled Labor's 1925 bill, the party's prevarication over capital punishment and the government's poor management of the campaign thwarted abolition for a further three decades. However, NSW's failure must be analysed in light of ambivalent abolitionism that prevailed in Britain and the US in the postwar decade. In this wider context, Queensland, rather than NSW, was the abolitionist outlier.

**Keywords:** Death penalty; Australia; abolition; capital punishment.

## Introduction

Histories of the death penalty's abolition tend, understandably, to focus on the endgame. By highlighting the political and legal stratagems that formally abolished capital punishment, such works have a Whiggish tinge—despite many hurdles and frustrations, laws were eventually changed to defeat the death penalty. There are important exceptions, foremost Randall McGowen's (1994) interpretation of the British Government's 1868 move to end the ritual of public execution. Far from a step towards abolition, he argues, this transition merely allowed respectable people to consider themselves civilised as they no longer had to witness unseemly executions or contend with unruly hanging crowds. In the 19th century, a handful of jurisdictions abolished the death penalty; however, England and most other countries in the Anglo-American sphere did not abolish the death penalty until the mid to late-20th century (Hood and Hoyle 2015). In several jurisdictions, including a few US states and the Australian state of Queensland, governments abolished the death penalty earlier and held back against retentionist cross-currents, but these were the exceptions (Barber 1968).

Under the terms of Federation in 1901, the former colonies of Australia became states and territories. Unlike Britain, Canada, New Zealand and most European countries, Australia's criminal law for ordinary crimes was determined by the states, which meant that abolitionists pitched their campaigns at the state level, as they did in the US. The new Commonwealth strove to sever its connection to the convict past, but the history of colonial authorities' heavy reliance on capital punishment in the early 19th century cast a long shadow (Finnane 1997; Castle 2008). Despite a precipitous decline in the number of executions by the late 19th century, this turnaround in penal severity did not lay the groundwork for abolition after Federation. Nevertheless, one state, Queensland, removed the death penalty from its criminal code in 1922 under a Labor government, and there were promising signs that New South Wales (NSW) might follow after Labor formed a majority government in 1925. The party tabled an abolition bill soon after taking power, and it passed the lower house of the state parliament only to sink in the upper



house. This defeat was consequential—the death penalty remained in force in NSW for a further 30 years, over which time five men were hanged (Curby 2017).

The ill-fated progress of abolitionism in NSW in the 1920s was not unique; on the contrary, it typifies the doldrums of politicking against capital punishment in the postwar period, a time of reinstatement and retentionism. Several countries, including the Soviet Union and Italy, redeployed the death penalty after a period of abolition, and six US states, which had earlier abolished capital punishment, reinstated it by the 1920s (Galliher, Ray and Cook 1992). In England, efforts to remove the death penalty for civilian crimes failed to gain traction, despite the Labour party's electoral successes in the 1923 and 1929 general elections. The one glimmer of success in Britain was the curtailment of the death penalty for infractions of military discipline in 1930 (McHugh 1999). Thus, retentionists around the world had the upper hand in the postwar period, although the reasons for their triumph in NSW in 1925 were distinct.

Drawing on parliamentary debates over abolition and digitised news coverage of the issue, this article corrects the false yet enduring claim (first made in 1968) that Labor solidly opposed the death penalty in the lead-up to the 1925 bill (Jones 1968). In NSW, abolition was not as divisive an issue as military conscription, which split the state party into bitter factions during the Great War; however, it was not a progressive reform that Labor embraced as it did other causes, notably a Court of Criminal Appeal. Opponents of Labor's 1925 abolition bill reminded its sponsors that Labor had not included abolition in its election promises. Retentionists also referred to the lack of clear signals of abolition's adoption in other jurisdictions grappling with the same issue in the postwar period. Factors unique to NSW, including its bicameral parliament and the timing of several controversial capital murders, reinforced support for capital punishment and derailed abolition in 1925. However, the cause of abolition struggled everywhere in the 1920s, and there was little public demand to end the death penalty beyond the narrow setting of military justice.

### **Labour and the Death Penalty in a Former Penal Colony**

In the colony of NSW, Labor first gained a parliamentary foothold in the 1890s, but the most outspoken opponent of capital punishment in the lead-up to Federation was a Free Trader and journalist, John Haynes. From 1896 to 1902, he drafted and sponsored four death penalty abolition bills, the last of which attacked the wide scope of capital crimes in NSW compared to Britain, which had radically pruned the number of death penalty offences in 1861 (Strange 1996: 146). Why, he asked, should NSW retain the death penalty for attempted murder, rape and seven other crimes as capital offences, when England had reduced its application to treason and murder decades earlier? In 1901, the execution of a man for the offence of carnal knowledge (the sexual assault of a girl under 10) in the NSW town of Queanbeyan dredged up memories of the 1888 execution of four men for the pack rape of a 16-year-old girl in Sydney (Kaladelfos 2012; Walker 1986). Still shocked by that event, Haynes hoped his 1902 bill would remove the death penalty for sexual offences and split the definition of murder into first and second degrees, with only planned and deliberate murders punishable by death. Three of Haynes' fellow members of the Legislative Assembly (MLAs) supported the bill in second reading, none of whom was a Labor member. Once again, he failed. No further bills reached second reading in the Legislative Assembly over the first decade of the 20th century, but there were signs that Labor might support the cause when it formed government for the first time in 1910.

Led by veteran MLA James McGowen, the victorious Labor party raised expectations (and fears) that the new government would institute root and branch reforms touching on social as well as economic matters. Labor introduced the judicial review of criminal sentences under the leadership of attorney-general William Holman, who skilfully persuaded both the Assembly and the Legislative Council to endorse a state court of criminal appeal. Opposition was stiff. During a lengthy debate in second reading, the MLA who had previously served as premier and attorney-general, Charles Wade, accused Holman of trying to foist decision-making on capital sentences into a new judicial tribunal rather than deal with death penalty cases through reviews made by the Cabinet, the executive branch of government. Wade accused Labor of political cowardice: 'the body of the government have some objection to capital punishment, but they have not the courage to come out straightforwardly and say so'. If Labor were truly opposed to the death penalty, Wade chided, 'the proper course to adopt is to ask the House to change the law with regard to capital offences; and then they can administer the law on lines which even they will not shirk from' (NSW Parliament Legislative Assembly 5 July 1911: 1321). Nevertheless, the Legislative Council made only minor amendments acceptable to the government and the *Criminal Appeal Act* came into force in 1912, allowing convicted offenders, including persons sentenced to death, to appeal on matters of fact as well as law (Woods 2018: 233–234).

Holman knew that Wade's barbs over Labor's lack of courage also targeted the government's handling of its first capital case. When the former government handed over the reins to Labor in October 1910, it dumped a dilemma on the new executive: the impending execution of William Phillips, a man who had sexually assaulted and brutally murdered his toddler daughter. The executive could simply have commuted the death sentence, and the government could have followed by declaring its opposition

to capital punishment; instead, the Cabinet decided that Phillips would be sentenced to life in prison, with the proviso that he was 'never to be released' (Strange 2012). A tempest erupted over the decision, and Labor's stance on the death penalty remained hazy until 1912 when premier McGowen's government approved the execution of William Ball for the murder of his wife (Strange 2020). After Australia entered the war in 1914, internal divisions over conscription split the party and, in 1916, a splinter group of former Labor members, led by William Holman, formed a new Nationalist Cabinet, which authorised the executions of four more men by 1917 (Hagan and Turner 1991).

After the Labor party regained government in 1920, holding its power tenuously to 1922, no hangings occurred; however, after a conservative coalition took office, two men were executed in 1924. The following year, Labor leader Jack T. Lang waged a successful campaign to return his party to power. To attract support, he promised electors shorter working hours, better compensation for injured workers, endowments for children and pensions for widows. However, Labor did not campaign on the abolition of capital punishment in 1925, despite the Political Labor Leagues' endorsement of the reform at its 1911 annual convention and the adoption of abolition as an official party plank in 1912 (Gilbert 1993: 3–4; Hogan 2008: 454). At best, the victorious Lang government's support for abolition was tepid.

### Abolition's Shaky Prelude

In the year before Labor's victory in 1925, seven men were sentenced to death in NSW and two were executed amid public controversy, but Labor made no stance against the death penalty while in opposition. On 19 April 1924, Edward Williams was the first man hanged in the state since 1917. The crime to which he confessed was a horrid familicide—he had slashed the throat of his wife and two small children, fearing that his daughter showed signs of the mental illness his wife suffered from. To many observers, the man seemed insane, but he was not defended on that ground, and he was convicted. Although the jury recommended mercy, they did not disclose their reasoning. Prominent barristers and MLAs rallied support at Sydney's Town Hall, attempting to persuade the Cabinet to commute the man's death sentence, and a deputation, including two Labor members, met with the attorney-general. Unpersuaded, the government, led by the recalcitrant minister of justice, refused to accept that Williams was insane. The second execution of 1924 was delayed by six months because the Court of Criminal Appeal considered whether the trial judge may have erred in his charge to the jury concerning the distinction between murder and manslaughter. In that case, William Simpson was convicted of shooting two men, one of them a police constable. After he launched a successful appeal, the court ordered that he face a new trial; however, Simpson was reconvicted, and he was sentenced to death again. Because his second appeal was unsuccessful, the Howard Prison Reform League appealed for mercy, but Labor did not back the campaign for the commutation of Simpson's sentence (McClellan and Beshara 2013: 21). The coalition government was resolute: 'if crimes of this character are going to be committed, we must have some punishment to act as a deterrent' (NSW Parliament Legislative Assembly 2 December 1924: 4082). Simpson was hanged at Long Bay Prison on 10 December 1924.

In the NSW Legislative Assembly, one of the coalition government's own members, Nationalist Robert Stopford, was the most outspoken critic of the death penalty. In July of 1924, he introduced a private members bill that proposed to divide murder into two degrees, with life the mandatory penalty for the first degree and a shorter term of imprisonment for the second (*Sydney Morning Herald* 27 June 1924). The *Sydney Sun* predicted that Stopford's bill would 'receive the unanimous support of the Labor Party' (*Sydney Sun* 27 June 1924), but it never reached second reading, and the *Sun*'s prediction was not tested while the coalition remained in power.

The return of the Labor party with a slim majority in the Legislative Assembly in May 1925 provided the best opportunity since 1910 to make its stance on capital punishment clear. Further, for the first time, the government followed Labor's official platform by introducing a bill to abolish the death penalty. The premier assigned his attorney-general, Edward McTiernan, to draft it. Having served in that portfolio in the previous Labor Cabinet, McTiernan had established himself as an advocate of civil liberties; however, he had not previously taken a public stance in favour of abolition (Kirby 1991). The attorney-general merely referred to the precedent of Queensland's abolition of capital punishment. In that state, Labor had also gone through its ructions after Federation, but the party did not fracture over conscription and held government through the war years and into the 1920s. While in office, Queensland's Labor premiers had used their power to appoint men to the state's upper house whom they hoped would support the demise of the unelected branch of government (Barber 1968). The plan worked—in March 1922, the bill to make Queensland's government unicameral received royal assent, and Labor was able to pass an abolition bill, which became law as of 1 August 1922 (Curby 2017).

## Labor Wins, Abolition Stalls

Like the first Labor government's executive in NSW, which had to contend with the vexing Phillips case upon taking office, premier Lang's Cabinet had to render a decision on a convicted murderer's death sentence within weeks of taking office. Alfred McInnes' crime was less contentious than Phillips' (the shooting of his ex-lover, Margaret Foley, followed by his attempted suicide), but the Court of Criminal Appeal dismissed the condemned man's appeal early in May 1925, which left the incoming Labor executive to decide whether to allow the law to take its course, commute the sentence or possibly use the commutation to flag the government's intention to follow Queensland's lead. When newspapers published the Cabinet's decision—that McInnes' sentence would be commuted—some felt it was 'in accordance with the Labor Policy, which is adverse to capital punishment' (*Tweed Daily* 19 June 1925). However, the government was less than forthright regarding its policy intentions.

While the attorney-general turned his attention to preparing an abolition bill, another murder conviction exposed the Labor government's ambivalence on abolition. Unlike McInnes, who had shot his former lover and attempted to end his own life (a factor that frequently moved Cabinets to commute), Arthur Oakes slashed and hammered his 25-year-old bride while she lay asleep, then covered up evidence of his crime. After he burned the razor and hammer he had used to kill the woman, it took weeks for the police to track him down. At his trial, the Crown showed that Oakes' gratuitous violence was aggravated by the fact that the victim, Mona Beacher, was pregnant. Thinking she was on her honeymoon, she discovered her husband was a bigamist. Although Oakes testified he 'went mad' after she discovered the truth and threatened to expose his duplicity, the jury found him guilty, and the judge characterised the man's crime as one of 'extraordinary brutality and incredible inhumanity'. On top of this, Oakes had tried to 'defame the girl's character with callous indifference that showed want of remorse' (*Bathurst National Advocate* 1 July 1925). Although the judge offered Oakes no hope of mercy, Labor's election victory did. As expected, premier Lang stated that the Cabinet had resolved to commute Oakes' death sentence, but the government decided Oakes's penalty ought to be the same as Phillips': 'the opinion of the Government is he should never be released from prison' (*Newcastle Morning Herald* 29 July 1925). Reports on the decision also noted that the premier made no connection between the commutation and the broader issue of the death penalty (*Sydney Daily Telegraph* 2 July 1925).

The Labor government's repeated commutations left its critics impatient for a clear policy ahead—to uphold or abolish capital punishment. The practice of de facto abolition through executive decisions on capital sentences had made Labor a target of derision since 1910, but this was only one half of the problem of partisan penal politics in NSW. According to Dr Stopford, the death penalty's administration in the state had become a travesty: 'if I, as a Nationalist member, were to commit murder, my Nationalist colleagues would forthwith hang me'. Yet, if Labor were in power, Stopford declared, he would serve a term of imprisonment: 'there is neither rhyme or reason in that; it suggests barbarism and not common sense' (NSW Parliament Legislative Assembly 22 July 1924: 471). The *Sydney Morning Herald* agreed with Stopford, even though it upheld the legitimacy of capital punishment. Surely the Labor party, having regained power in 1925, ought to introduce a bill that would be 'dealt with on a non-party basis'. Whatever the outcome, 'no one will deny that the existing condition of the law is thoroughly unsatisfactory'. As long as capital punishment remained lawful, it should be inflicted, 'save in very exceptional circumstances'. However, 'if it is antipathetic to our humanitarian principles, it should be formally expunged from the statute book' (*Sydney Morning Herald* 3 July 1925).

Under public pressure, the parliamentary Labor caucus endorsed the government's abolition bill in August 1925, after attorney-general McTiernan introduced it on 1 September. Despite holding the majority of seats, the bill's passage through the Assembly was bumpy, and opposition members interrupted repeatedly. McTiernan opened with complicated references to parallel legislation, including the Commonwealth *Crimes Act 1914* and Imperial acts, then explained that four of the offences then punishable by death (treason, murder, rape and carnal knowledge of a girl under the age of 10) would, under this bill, be subject to the mandatory penalty of life in prison. The first question put to McTiernan was a logical one, considering the executive's recent rider in Oakes' commuted sentence: did 'penal servitude for life' really mean life, one member demanded? The attorney-general simply said it did (NSW Parliament Legislative Assembly 2 September 1925: 528).

Rather than try to persuade members to support abolition on humanitarian grounds, as was typical in 19th-century abolitionist rhetoric, McTiernan summarised the reasons behind his party's disapproval of the death penalty: the danger of wrongful convictions, jurors' reluctance to convict on capital charges, the detrimental morbid effects on the public mind and the proven example of abolition in other jurisdictions. 'In States and countries where it has been abolished no increase in crimes of violence has occurred', McTiernan claimed, and in the US, the murder rate was higher in states that retained capital punishment than it was in those that had abolished the death penalty. Moving closer to home, he referred to Queensland's recent abolition legislation, which had not produced an uptick in the number of murders. Since 'in practice, the death penalty has been abolished in the State of New South Wales', McTiernan proposed, the time had come to wipe 'the anachronism off the statute books' (NSW Parliament Legislative Assembly 2 September 1925: 528, 532).

Members on the crossbench, and several of McTiernan's fellow Labor men doubted that a time-tested penalty should be relinquished, and they challenged the attorney-general's reasoning. Although they voiced a familiar refrain—that the death penalty had a unique deterrent effect—the bill's opponents had a new point in their favour: NSW's Court of Criminal Appeal. Since 1912, convicted criminals, including persons sentenced to death, were afforded the opportunity to have their convictions reviewed by a higher tribunal; further, if the Court upheld their sentence, the Cabinet could still commute if there was any doubt that capital punishment was warranted. Retentionists also objected to abolitionists' characterisation of the death penalty as a 'barbarous survival' of the past. One Nationalist MLA Albert Bruntnell countered that retentionists were 'just as humane, just as anxious about the protection of human life' (NSW Parliament, Legislative Assembly, 2 September 1925: 532, 534). Consequently, it was unwise to abolish the death penalty; instead, the government must 'steer a course between what might be called "brutal vindictiveness" on the one hand, and "mawkish sentimentality" on the other' (NSW Parliament Legislative Assembly 2 September 1925: 533).

The leader of the Nationalist party, Thomas Bavin, outmatched Labor's attorney-general and foreshadowed the bill's fate in the Legislative Council. As the previous government's minister of justice and attorney-general, Bavin believed the death penalty ought to be retained for murder 'in what was known as the first degree', and for treason, rape and carnal knowledge, although he was prepared to concede that sexual offences ought not to be capital. But, whatever the government proposed, Bavin insisted Labor had no popular mandate to abolish the death penalty since, in the lead-up to the election, abolition was 'not a prominent part, nor part at all, of the actual programme that the government said it would carry out' (NSW Parliament Legislative Assembly 10 September 1925: 723, 721). Consequently, if the Legislative Council were to block the bill it could not be accused of disregarding the people's will. Only 43 of the 46 Labor MLAs voted in favour of sending the bill to Committee on 10 October 1925 and, a week later, the Legislative Council proceeded as the opposition expected.

### A Tussle in the Upper House

In 1856, an upper house of appointees, named the Legislative Council, was established to form one branch of government in the colony of NSW. From that point onward, elected legislators chafed at the Council's unaccountable power to review legislation, and these objections grew louder after Labor men began to sit in the Assembly. In 1898, when NSW Labor put together its 'fighting platform', the abolition of the Council became its first plank, but, in the years before it first formed government, non-Labor state premiers kept making appointments—men who served for life and leaned towards the conservative side of politics. By 1910, only six of the 54 members of the Legislative Council were affiliated with Labor (Nairn 1995: 9). Although premier McGowen could have followed Queensland's lead by appointing pro-Labor men favourable to the Council's abolition, neither McGowen nor his successor (Holman) loaded up Labor appointments once in government in 1910 (Clune and Griffith 2006: 243; Lovelock and Evans 2008: 28). After its wartime split, Labor's next stint in government was brief, and non-Labor men continued to dominate the upper house in the early 1920s, some having served for decades. Although a bare majority of MLAs endorsed abolition and supported the government's bill in the Assembly, the prospect that it would sail through NSW's upper house was far dimmer in 1925 than it was in Queensland in 1922, by which time its unicameral government could have its way (Curby 2017: 55).

After the election of 1925, Labor MLCs were still in the minority (just 26 of the 74 members), so the man chosen to sell the abolition bill to his Council colleagues faced stiff opposition. Arthur Willis, a former union official and president of the Australian Labor Party was a controversial personal choice of premier Lang (Nairn 1995: 97) Although he was appointed vice-president of the Executive Council and the government's representative in the Legislative Council, he had no parliamentary experience in negotiating with opponents to bills (Nairn 1995: 103). The first challenge Willis faced was the charge that Labor had no mandate to introduce such a radical deviation from British penal policy. Francis Boyce KC, future attorney-general in the Nationalist government that would replace Labor in 1927, needled the government on that point. Rather than side with another Australian state, NSW must acknowledge that 'with the single exception of Queensland', there was 'no place in the British Empire' in which such a bill had been passed (NSW Parliament Legislative Council 23 September 1925: 955).

Although Boyce and several other Nationalists considered that sexual offences should not be subject to the death penalty, murder must be a capital offence, as it was in Britain. If there was any cause for reform, it was the capital status of rape and carnal knowledge, which had not been punishable by death since 1861 in the 'old' country. In NSW, it was still possible for men to be condemned to death upon the word of a girl or woman, and this was a problem Boyce could address through his own experience as a barrister. In 1907, he informed his fellow Councillors, he had served as the Crown prosecutor in the prosecution of a man (Reuben Ward), who was convicted of rape and sentenced to death. Although the Cabinet commuted Ward's sentence to life, petitioners subsequently alleged the woman's character was unsavoury, and Ward was freed after three months in prison (*Dubbo Liberal and Macquarie Advocate* 7 December 1907). Yet, Boyce thought no such injustice could occur in the conviction of murderers. Again, he referred to his courtroom career. In 1901, Indigenous man Jimmy Governor, who had been outlawed

along with his brother as suspects in the slaughter of several white settlers, justly suffered ‘the extreme penalty’, Boyce asserted. Although he had been Governor’s court-appointed defence council, he surmised the outlaw would have resumed his attacks had he not been hanged (NSW Parliament Legislative Council 23 September 1925: 957; Foster 2018). Speaking before a body of elderly white men, Boyce could be certain that no MLC would have forgotten the case of the ‘Breelong Blacks’.

The abolition bill’s opponents in the Council chambers also seized on its vagueness regarding the proposed substitute penalty for murder—life imprisonment. In response to questions that might have reassured critics of the bill, Willis’ answers were as vague as McTiernan’s response in the Assembly. When asked whether ‘penal servitude for life’ meant that an offender, ‘previously subject to the penalty of death upon conviction, must endure imprisonment for the term of their natural life’, Willis lacked confidence: ‘I am not a lawyer but I am advised the words mean what they say – for the term of his natural life’ (NSW Parliament Legislative Council 17 September 1925: 845). Yet, the bill plainly failed to state this. Henry M. Doyle, originally a Labor appointee, who later voted as an independent, turned up the heat on Willis, concerned that an uncertain alternative to death was powerless to deter murderers. Although the government’s bill rightfully preserved the powers of the Executive Council to reprieve any punishment, Doyle acknowledged, he worried that persons serving life sentences could anticipate serving, at most, 15 to 20 years. How, then, could the bill deter violent crime? (NSW Parliament Legislative Council 17 September 1925: 846). Unable to allay those concerns, Willis closed by scolding his critics: they must not to support the law ‘which gives us a right to employ a man to legally, so called, murder another and then shelter ourselves behind him’ (NSW Parliament Legislative Council 17 September: 846).

Every time the Legislative Council of NSW considered a bill from the Assembly, it exercised its powers of review in three ways: it could vote that it be passed, it could reject it, or it could amend it and send it back for the Assembly’s consideration. Presented with the 1925 abolition bill, the Council returned it with amendments that retained the death penalty. Boyce took the lead in flexing the Council’s muscle, assisted by J. B. Peden, fellow Nationalist and dean of the Faculty of Law at the University of Sydney. Together, they moved an amendment to retain the penalty of death for murder (in accordance with the Commonwealth *Crimes Act 1914*, section 24), which set death as the penalty for treason (NSW Parliament Legislative Council 15 October 1925: 1572–1573). When the proposed retentionist alteration was put to the vote, it passed by a majority of five in the upper house. Of the 27 MLCs who supported retaining the death penalty for murder, two independents, two Progressives and 23 Nationalists voted for the amendment. Two opposition members did vote against the Boyce-Peden retention amendment; otherwise, the Council’s review followed predictable party lines—Labor’s abolition bill was eviscerated.

‘Another Defeat: Council Amends Capital Punishment Bill’ (Goulburn *Evening Penny Post* 16 October 1925). Headlines announced that Labor had been thwarted in its bid to wipe the death penalty from the slate of criminal penalties in NSW. Having never spoken on the matter in the Assembly, premier Lang belatedly made a ‘significant statement’. Yet, he did not declare his party’s enduring support for the death penalty’s abolition; instead, Lang used the bill’s defeat to demonstrate the need to abolish the Legislative Council. When a Nationalist MLA asked whether Labor was prepared to gauge ‘the feeling’ of the electorate on capital punishment, ‘in view of the defeat of the Government in the Legislative Council’, Lang deflected the question by calling the Council a ‘House of privilege’, bloated with ‘representatives of the idle rich’. As long as that house existed, he thundered, ‘the State of New South Wales would never be able to control its own destiny’ (NSW Parliament Legislative Assembly 15 October 1925: 1588). From that point onward, ‘abolition’ in NSW referred to the riddance of bicameral government, not an end to the death penalty.

Cynical observers accused the Labor government of using the divisive issue of capital punishment to shore up support for the Council’s demise and to justify swamping it with Labor appointees (Curby 2017). The premier did just that. After Lang recommended the appointment of Willis and two other Labor men to the Council in his first months as premier, he recommended 25 new appointees three months after the bill’s defeat (Freudenberg 1991: 144). Yet, this strategy, which the Queensland government had implemented incrementally, crumbled before Lang’s eyes. In 1926, Labor’s bill to abolish the Legislative Council failed, blocked by Labor as well as opposition members in the upper house. Then, in 1927, the electorate voted out Lang’s government.

### **The Wider World of Abolition in the Postwar Period**

The political and constitutional issues specific to NSW, in addition to locally significant capital cases and the state’s penal colony past, rendered the abolition debate of 1925 unique. Yet, proponents and opponents of capital punishment referred to the status of the death penalty elsewhere, not just in Queensland but in the wider world. Francis Boyce’s reluctance to diverge from British precedent expressed what most Anglo-Australian lawmakers believed: guidance on criminal law reform should come from the ‘mother’ country. When participants in the NSW abolition debate looked beyond Australia’s borders for reference points, they found plenty of evidence that retentionism was the rule in Britain and beyond in the postwar decade.

The Labor men assigned to lead the abolition bill through the Assembly and Council in NSW stood on shaky ground by referring to the record of European countries and US states that had abolished the death penalty; retentionists countered with evidence that several abolitionist states in the US had reinstated it by the 1920s. The enormous losses of the Great War added weight to claims that abolitionists were sentimental and soft-headed. After so many heroic men had died, surely now was not the time to abandon penal tradition by sparing bad men from the ultimate penalty (Bailey 2000: 307). On top of that, the violent crime wave that followed the Great War in many jurisdictions heightened anxiety over dropping the law's most powerful deterrent (Hood and Hoyle 2015: 13). During the 1920s, the only country that abolished the death penalty was Iceland, a country of fewer than 100,000 people, where no executions had occurred since 1830 (Hood and Hoyle 2015: 49).

Compared to the postwar period, the mid-19th and early-20th centuries were more propitious times for death penalty abolition (Gregory 2011). In 1846, the state of Michigan became the first modern jurisdiction to abolish the death penalty, riding a wave of revulsion over various forms of unwarranted suffering, including slavery. Wisconsin and Rhode Island followed, along with several European states. A surge in successful abolition campaigns also occurred in the Progressive Era (roughly the late-1890s to 1920), when state-supported social reform and welfare programs were introduced in the US to tackle a wide range of social problems, including criminality and delinquency (Galliher, Ray and Cook 1992). Through expert criminological study and social engineering, Progressives believed, society could be made secure without resort to the death penalty, and this hope inspired 10 US states to abolish the death penalty, turning executions, like torture, into a vestige of the past. In NSW, abolitionists such as John Haynes were similarly motivated to reject a punishment strongly associated with the convict regime. However, by the 1920s, Australian abolitionists had to quote selectively when they referred to US examples to support their cause.

Evidence of the death penalty's reinstatement began to mount by the war's end, by which point five of the 10 abolitionist states in the US restored capital punishment in their penal codes (Galliher, Ray and Cook 1992: 541). Tennessee was one of these. After it abolished the death penalty in 1915, it reinstated it four years later. Progressives and conservatives agreed that restoring and enforcing the death penalty would reduce the problem of vigilante justice. In 1919, mob violence and race riots raged in many parts of the US, lending credibility to such claims (Vandiver 2005: 163–164). Instead of abolishing capital punishment, several US states broke with penal tradition by modernising the means of putting offenders to death: the electric chair and gas chamber (Sarat 2014).

When death penalty critics in NSW cited statistics from non-British countries, retentionists accused them of following bad examples, particularly the former Russian empire. Opponents of abolition were fond of accusing Labor of sympathising with the Soviet Union and they extended that criticism by citing the communist regime's patchy record of on-again, off-again abolition. When the Council debated Willis' bill, Sir G. F. Earp, an MLC in NSW since 1900, observed that the Soviets had recently reintroduced the death penalty. Because executions were carried out infrequently in 'democratic countries' to protect the law-abiding majority, Earp asked, would the abolition of capital punishment lead to 'sacrificing the community to the individual?' (NSW Parliament Legislative Council 23 September 1925: 961). His question was rhetorical: NSW must adhere to the example set by Britain and its white settler colonies by retaining the death penalty.

In the early 19th century, England's 'bloody code' made it a target of penal reformers, but England had become a model of penal restraint by the early 20<sup>th</sup> century. Between 1900 and 1925, 15 offenders were hanged in England and Wales each year on average, in stark contrast to the hundreds put to death publicly for a host of offences prior to the ameliorative reforms Sir Robert Peel introduced in the 1830s (Block and Hostetler 1997: 90; Devereaux 2013). Although England had also narrowed down the death penalty's application to murder and treason in 1861 and followed that by making executions private ceremonies, the rosy-eyed Dr Stopford regretted that this was as far as penal reform had proceeded in Britain. In 1922, an English member of parliament (MP), Independent Christopher Lowther, sought leave to introduce a bill 'to abolish in Great Britain the award of capital punishment for any crime or offence whatsoever', but he got nowhere (UK House of Commons 1 March 1922: cc393–397). More dispiriting for abolitionists was the first Labour government's inaction on capital punishment after it formed a minority government in Britain early in 1924 (Bailey 2000: 307). If NSW were to abolish the death penalty, it would have to lead England for a change. In the meantime, Stopford gloomily observed, 'the presence on our statute-book, in this State and in the Mother country, of the capital penalty is a remnant of the barbaric age' (NSW Parliament Legislative Assembly 22 July 1924: 473).

Abolitionists' references to the death penalty as an impediment to the march of civilisation fell on deaf ears in the NSW parliament as it did in the 'Mother' country. Yet, there were some signs that the British public was becoming ill at ease about capital punishment in the postwar period. In 1922, the executions of Mrs Edith Thompson and her lover Frederick Bywaters, for the murder of her husband, troubled many English observers, including the executioner, who took his life shortly after he executed the pair (Bland 2008). Two years later, Quaker Liberal MP Edmund Harvey presented a petition organised by the

Society of Friends and signed by almost 19,000 people, who viewed ‘with abhorrence the continuance in Great Britain of the punishment of death, and praying that a measure be introduced into Parliament for its speedy abolition’ (quoted in Block and Hostetler 1997: 89). However, prime minister Ramsay MacDonald’s Labour government’s hold on power was fragile, and he was not game to test the waters of support for abolition. Labour’s inaction prompted British lobbyists to mobilise extra-parliamentary support. By 1925, the Howard League for Penal Reform, long opposed to the death penalty, joined the new National Council for the Abolition of the Death Penalty, and both organisations took up the cause (Bailey 2000: 313–314).

A clearer sign of a change in heart towards the death penalty in Britain was the successful campaign to curtail the use of capital punishment for offences against military discipline (McHugh 1999). Opponents of the law (which had led to the execution of over 300 British and Imperial servicemen in World War I, primarily for cowardice and desertion) tried to use the annual review of the Army Bill in parliament to remove the death penalty for military infractions (Corns and Hughes Wilson, 2005). For British MPs, the fact that no Australian serviceman had been executed in the Great War (although some were sentenced to death by courts martial) suggested the penalty was not required to instil discipline (Finnane and Smaal 2020). During a debate on the Army Bill in 1925, Labour backbencher, Ernest Thurtle, put this question to the British minister of defence:

Is the Minister going to rise in his place to-day and say that Australian troops may be trusted to fight with courage and determination without this dread death penalty hanging over their heads, but that British troops are not to be so trusted?  
(UK House of Commons 1 April 1925: c1349)

This comparison had the potential to win over conservatives: Australian soldiers did not need the threat of being shot at dawn to induce them to fight for the Empire. Military officials in Australia backed up this claim. In the forthright words of one adjutant general, ‘the maximum punishments allowed in our [Defence] Act are sufficient to be a deterrent against the worst breaches of discipline’ (quoted in Finnane and Smaal 2020: 333). Unlike the governments of Canada and New Zealand, Australia’s military leaders had refused to allow British authorities to impose the sanction on their troops. In 1930, an amendment to the Army Bill, proposing to end capital punishment for cowardice and desertion, passed by a resounding measure in the British Parliament, marking a small but significant victory for abolitionism.

Although Australia’s wartime military and political leaders were remarkably steadfast against the death penalty for serious military offences, the men premier Lang appointed to support Labor’s abolition bill in NSW did not refer to that precedent. In postwar Australia, Queensland was the one state where the abolition of capital punishment for civilian offences was linked to a progressive notion of Australian identity. Even there, a structural change to government had to be instituted to pull the cause of abolition over the victory line.

## Conclusion

In Australian Labor history, the claim that the Labor party has always opposed the death penalty has stood since Barry Jones’ *The Penalty is Death* was published in 1968 (Lennan and William 2012). A Labor government did abolish the death penalty in NSW in 1955, but the execution of William Ball in 1912 counters Jones’ claim, still cited in legal historical works, that ‘all death sentences were ... commuted under NSW Labor governments’ (Jones 1968: 256). In 1910, 1920 and 1925, the people of NSW voted for Labor governments, but the party did not promote the death penalty abolition plank in its fighting platform. For Labor leaders of the early 20th century, abolition referred to the first plank: the eradication of the Legislative Council. Compared with attorney-general Holman’s skilful commitment to enact a Court of Criminal Appeal in NSW, the men who took carriage of the death penalty abolition bill were lacklustre. Further, the bill itself failed to address legitimate questions over the penal alternatives to the death penalty. The party’s ambivalence over capital punishment also perpetuated the cruel farce of the likelihood of execution dependant on the stripe of the sitting government. Although the Labor administrations that followed Lang’s first term as premier commuted all death sentences its Cabinets considered, the four hangings that occurred over the 1930s might not have taken place had Labor committed to abolition as a political end instead of a means to do away with the upper house.

Scrutinised through the wider lens of abolition’s fate in the 20th century, the history of the defeated abolition bill in 1925 is not remarkable—the postwar period was unfavourable to campaigners against the death penalty internationally. The exception was the successful effort mounted in Britain to spare cowards and deserters from the penalty paid by hundreds of men under British military authority during the Great War. However, that reform was carried out through an amendment to the Army Bill, not proposed through legislation that would have departed explicitly from reliance on death as the ultimate penalty for criminal offences. In the century since NSW Labor failed in its first attempt to abolish the death penalty, no government has undertaken that penal reform in response to popular pressure. The statutes and constitutions that have formalised abolition have papered

over the enduring appeal of capital punishment to politicians and the public, not just in the past and present but likely into the future.

## References

- Bailey V (2000) The shadow of the gallows: The death penalty and the British Labour Government, 1945–51. *Law and History Review* 18(2): 305–349. <https://doi.org/10.2307/744298>
- Barber RN (1968) The Labor Party and the abolition of capital punishment in Queensland, 1899–1922. *Queensland Heritage* 1(9): 3–12.
- Bathurst National Advocate* 1 July 1925.
- Bland L (2008) The trials and tribulations of Edith Thompson: The capital crime of sexual incitement in 1920s England. *Journal of British Studies* 47(3): 624–648. <http://doi.org/10.1086/587725>
- Block BP and Hostetler J (1997) *Hanging in the balance: A history of the abolition of capital punishment in Britain*. Sheffield-on-Loddon: Waterside Press.
- Castle T (2008) Watching them hang: Capital punishment and public support in Colonial New South Wales, 1826–1836. *History Australia* 5(2): 43.1–43.15. <https://doi.org/10.2104/ha080043>
- Clune D and Griffith G (2006) *Decision and deliberation: The Parliament of New South Wales, 1856–2003*. Annandale: The Federation Press.
- Corns C and Hughes-Wilson J (2005) *Blindfold and alone: British Military executions in the Great War*. London: Cassell.
- Curby P (2017) Cold-blooded judicial murder, 1910–1925. *Journal of the Royal Australian Historical Society* 103(1): 40–60.
- Devereaux S (2013) England’s ‘bloody code’ in crisis and transition: Executions at the Old Bailey, 1760–1837. *Journal of the Canadian Historical Association/Revue de la Société historique du Canada* 24: 71–113. <https://doi.org/10.7202/1025075ar>
- Dubbo Liberal and Macquarie Advocate* 7 December 1907)
- Finnane M (1997) *Punishment in Australian society*. Melbourne: Oxford University Press.
- Finnane M and Smaal Y (2020) Character, discipline, law: Courts martial in World War I. *Australian Historical Studies* 51(3): 324–340. <https://doi.org/10.1080/1031461X.2020.1741657>
- Foster M (2018) Murder for white consumption? Jimmy Governor and the Bush Ballad. In Huang Y and Weaver-Hightower R (eds) *Archiving settler colonialism: Culture, space and race*: 173–189. London: Routledge.
- Freudenberg G (1991) *Cause for power: The official history of the New South Wales Branch of the Labor Party*. Leichhardt: Pluto Press.
- Gilbert C (1993) *Capital punishment in New South Wales*. Sydney: New South Wales Parliamentary Library.
- Galliher JF, Ray G and Cook B (1992) Abolition and reinstatement of capital punishment during the Progressive Era and early 20th century. *The Journal of Criminal Law and Criminology* 83(3): 538–576.
- Garland D (2010) *Peculiar institution: America’s death penalty in an age of abolition*. Cambridge: Harvard University Press.
- Goulburn *Evening Penny Post* 16 October 1925
- Gregory J (2011) *Victorians against the gallows: Capital punishment and the abolitionist movement in nineteenth-century Britain*. London: Bloomsbury.
- Hagan J and Turner K (1991) *A history of the Labor Party in New South Wales, 1891–1991*. Melbourne: Longman Cheshire.
- Hogan M (ed.) (2008) *Labor pains: Early conference and executive reports of the Labor Party of New South Wales, vol. 3*. Annandale: The Federation Press.
- Hood R and Hoyle C (2015) *The death penalty: A worldwide perspective*. Oxford: Oxford University Press.
- Jones B (ed.) (1968) *The Penalty is death: Capital punishment in the twentieth century, retentionist and abolitionist arguments with special reference to Australia*. Melbourne: Sun Books.
- Kaladelfos A (2012) The politics of punishment: Rape and the death penalty in colonial Australia, 1841–1901. *History Australia* 9(1): 155–175. <https://doi.org/10.1080/14490854.2012.11668407>
- Kirby M (1991) Sir Edward McTiernan: A centenary reflection. *Federal Law Review* 20(2): 165–184.
- Lennan J and Williams G (2012) The death penalty in Australian law. *Sydney Law Review* 34(4): 559–594.
- Lovelock L and Evans J (2008) *New South Wales Legislative Council practice*. Annandale: The Federation Press.
- McClellan P and Beshara C (2013) *A matter of fact: The origins and history of the NSW Court of Criminal Appeal*. Sydney: Judicial Commission of NSW.
- McGowen R (1994) Civilizing punishment: The end of the public execution in England. *Journal of British Studies* 33(3): 257–282. <https://doi.org/10.1086/386055>
- McHugh J (1999) The Labour Party and the parliamentary campaign to abolish the military death penalty, 1919–1930. *The Historical Journal* 42(1): 233–249. <https://doi.org/10.1017/S0018246X98008334>

- Nairn B (1995) *Big fella: Jack Lang and the Australian Labour Party, 1891–1949, New edition*. Melbourne: Melbourne University Press.
- Newcastle Morning Herald* 29 July 1925
- Sarat A (2014). *Gruesome spectacles: Botched executions and America's death penalty*. Stanford: Stanford University Press.
- 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*: 30–65. Vancouver: University of British Columbia Press.
- Strange C (2012) Phillips brief: Never to be released? *Criminal Law Journal* 36(6): 395–396.
- Strange C (2020) Passions of the broken-hearted. *Meanjin* 79(3): 145-149.
- Sydney Daily Telegraph* 2 July 1925
- Sydney Morning Herald* 27 June 1924
- Sydney Morning Herald* 3 July 1925
- Sydney Sun* 27 June 1924
- Tweed Daily* 19 June 1925
- Van den Berg GP (1983) The Soviet Union and the death penalty. *Soviet Studies* 30(5): 154–74.  
<https://doi.org/10.1080/09668138308411469>
- Vandiver M (2005) *Lethal punishment: Lynchings and legal executions in the South*. New Brunswick: Rutgers University Press.
- Walker D (1986) Youth on trial: The Mt Rennie case. *Labour History* 50 (May): 28-41.
- Woods GD (2018) *A history of criminal law in New South Wales – Volume 2: The new state, 1901–1955*. Annandale: The Federation Press.

### Legislation Cited

- Criminal Appeal Act 1912* (Commonwealth)
- Crimes Act 1914* (Commonwealth)

### Parliamentary Debates Cited

- New South Wales Parliament. *Debates of the Legislative Assembly*.
- New South Wales Parliament. *Debates of the Legislative Council*.
- United Kingdom House of Commons. *Debates of the House of Commons*.