

The Death Penalty in Australian Law

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Abstract

This article undertakes a comprehensive review of Australian legislation on the death penalty. It charts the legal progress towards abolition, detailing the successive moves by colonial, state, territory and Commonwealth legislatures to restrict and then completely abolish capital punishment. Most recently, the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) blocks any state or territory attempt to reinstate the death penalty. The article examines whether any action now remains to be taken in Australia in this area. It considers the extent to which laws and practices on extradition and policing might involve Australian authorities in processes leading to the imposition of the death penalty abroad. It is suggested that while the 2010 Act represents the last necessary step (save for constitutional entrenchment) to abolish the death penalty in Australia, action can still be taken as a matter of principled opposition to the death penalty to ensure that Australian officials are not involved in the imposition of capital punishment elsewhere.

I Introduction

In 2010, the Commonwealth Parliament passed the first new Australian law on the death penalty for many years. The *Commonwealth Death Penalty Abolition Act 1973* (Cth) had abolished the death penalty under federal law. However, nothing in that Act precluded the use of the death penalty under state or territory law. This gap was filled by the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) ('the 2010 Act'), which blocks any state or territory attempt to reintroduce capital punishment. It amounts to a clear statement of national law that Australia renounces the death penalty now and into the future.

The federal Parliament took this step as the international community continues to move to abolish the death penalty: more than two thirds of the world's countries have now done so, either officially or in practice, and the list continues to grow.¹ Likewise, at the level of international law, instruments continue to

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¹ Amnesty International, *Abolitionist and Retentionist Countries* <<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>>.

strengthen or reaffirm restrictions or bans on the penalty's use.² In particular, the Second Optional Protocol to the International Covenant on Civil and Political Rights — which Australia ratified on 2 October 1990 — requires that 'Each State Party shall take all necessary steps to abolish the death penalty within its jurisdiction.'³ Having abolished the penalty in federal law in 1973, Australia's next 'necessary step' was thus the passage of the 2010 Act.

This 2010 development should not however be seen as reflecting unequivocal opposition to the death penalty from Australia's leaders. Despite international progress and developments in domestic law, the death penalty has by no means faded from public debate. The penalty has not been available anywhere in Australia since 1985, but discussion about whether it should be reintroduced often gains fresh life when a particularly vicious crime is committed or a foreign despot toppled. None of Australia's main political parties has a policy supporting the penalty's return, but individual members of Parliament have recorded their support for this,⁴ and Australia's most prominent politicians are prone to inconsistency on the topic.

Federal Opposition Leader Tony Abbott did not speak against the passage of the 2010 Act in the House of Representatives, but he told the *Herald Sun* only days before the vote that although he had 'always been against the death penalty':

I sometimes find myself thinking, though, that there are some crimes so horrific that maybe that's the only way to adequately convey the horror of what's been done... [W]hat would you do with someone who cold-bloodedly brought about the deaths of hundreds or thousands of innocent people? I mean, you've got to

² A detailed treatment of the content of international law as it relates to the death penalty can be found, for example, in Andrew Byrnes, 'The right to life, the death penalty and human rights law: An international and Australian perspective' in Michael Costigan, Peter Norden, Brian Deegan and Andrew Byrnes (eds), *Confronting the Death Penalty: People, Politics and Principle* (Australian Catholic Social Justice Council, 2007) 26–45, 32–5; Steven Freeland, 'No longer acceptable: the exclusion of the death penalty under international criminal law' (2010) 15(2) *Australian Journal of Human Rights* 1; and Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia', (2011) 33 *Sydney Law Review* 95.

³ *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991). Australia was one of the 31 sponsors of the draft Protocol in the UN General Assembly. Australia has also ratified other treaties that restrict the penalty's use: the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (an initial reservation allowing the Australian military to execute people was withdrawn on 21 February 1974); *The Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

⁴ These include so-called 'kingmaker' independent MP Tony Windsor. Windsor did not speak against the 2010 bill in Parliament, but in the mid-1990s made a bid to reintroduce the death penalty for murder in New South Wales. Windsor, who believes that executions should be carried out only when there is no doubt of guilt (a standard not known to the criminal law), has said, 'Under certain circumstances, I wouldn't lose a lot of sleep if someone didn't wake up again.' David Marr, 'Death and the State' *The Sydney Morning Herald* (online), 23 October 2010 <<http://www.smh.com.au/national/death-and-the-state-20101022-16xw5.html>>.

ask yourself, what punishment would fit that crime? That's when you do start to think that maybe the only appropriate punishment is death.'⁵

Abbott added that although it was not his policy to reintroduce the death penalty, if the matter ever came before the federal Parliament it should be put to a conscience vote.⁶ Abbott is by no means alone in voicing contradictory positions; Kevin Rudd, who had previously described the death penalty as 'abhorrent' and 'unacceptable in all its forms', said as Prime Minister on Perth radio station 6PR that the Bali bombers (who were then on death row in Indonesia and have since been executed) would 'deserve the justice that will be delivered to them'.⁷ John Howard also voiced incongruous views as Prime Minister: in 2001, for example, he said that he had 'a pragmatic opposition to the death penalty that is based on the belief that from time to time the law makes mistakes and you can't bring somebody back after you've executed them'.⁸ But on the *Sunrise* television program in February 2003, Howard said that the Bali bombers:

should be dealt with in accordance with Indonesian law ... and if [the death penalty] is what the law of Indonesia provides, well, that is how things should proceed. There won't be any protest from Australia.⁹

Similarly, in March that year, Howard told US television that he would welcome the death penalty for Osama Bin Laden, adding, 'I think everybody would'.¹⁰ And, speaking on Melbourne radio station 3AW on 7 August 2003, Howard told a caller, 'If people want to raise it again it would be open for example to the Victorian Opposition, if you have a different view on this matter to promote it as an electoral issue'.¹¹

Polling of public sentiment also shows vacillation, but it is plain that a substantial minority (if not a bare majority) of Australians still support the penalty's use in certain circumstances. In a poll conducted in August 2003, the question 'would you personally be in favour or against the introduction of the death penalty for those found guilty of committing major acts of terrorism?' drew a

⁵ Paul Toohey, 'Tony Abbott says death penalty fitting for mass killers' *Herald Sun* (online), 20 February 2010 <<http://www.heraldsun.com.au/news/tony-abbott-says-death-penalty-fitting-for-mass-killers/story-e6frf7jo-1225832368108>>.

⁶ Ibid.

⁷ 'Bali Bombers Deserve Punishment: Rudd' *ABC News* (online), 10 February 2008 <<http://www.abc.net.au/news/2008-10-02/bali-bombers-deserve-punishment-rudd/528998>>.

⁸ Doorstop interview on 13 June 2001, quoted in New South Wales Council for Civil Liberties, *Australia's Policy on the Death Penalty*, New South Wales Council for Civil Liberties, <http://www.nswccl.org.au/issues/death_penalty/aust_policy.php#fn5>.

⁹ Channel 7, 'Interview with John Howard (Part 2)', *Sunday Sunrise*, 16 February 2003.

¹⁰ Fox News Channel, 'John Howard, Australian Prime Minister', *Your World with Neil Cavuto*, 6 March 2003.

¹¹ Margo Kingston, 'Howard to the States: Capital Punishment Your Call' *The Sydney Morning Herald* (online), 8 August 2003 <<http://www.smh.com.au/articles/2003/08/08/1060145858623.html>>. See also the subsequent media coverage, cited in Michael Kirby, 'The High Court and the Death Penalty: Looking Back, Looking Forward, Looking Around' (2003) 77 *Australian Law Journal* 811, 818. For politicians' statements on the issue prior to 2000, see the discussions in Sam Garkawe 'The reintroduction of the death penalty in Australia? Political and legal considerations' (2000) 24 *Criminal Law Journal* 101, 102; and Michael Walton, 'The Death Penalty in Australia and Overseas', New South Wales Council for Civil Liberties Background Paper 2005/3, 29 March 2005, 14.

‘yes’ response from 56 per cent of respondents.¹² A poll published in *The Bulletin* on 1 March 2005 showed that that 49 per cent of Australians supported capital punishment more generally (with 47 per cent disagreeing), while the broader-based 2010 Electoral Survey by the Australian National University found 45 per cent supported the penalty’s reintroduction, down from a figure of 60 per cent in the same survey in 1987.¹³ It appears that in Australia, as elsewhere, the level of support for the death penalty depends on the precise question posed and the options given to respondents.¹⁴ It also depends on the events and rhetoric of the day: a 2009 Roy Morgan poll found that 50 per cent of Australians wanted Indonesia to execute convicted heroin traffickers Scott Rush, Andrew Chan and Myuran Sukumaran, but the same poll in 2010 showed that the proportion had dropped significantly.¹⁵ As journalist David Marr has put it, ‘[i]n response to death, threats of death, terrorist slaughter and the drug trade, the national mood is volatile.’¹⁶

The purpose of drawing attention to political rhetoric and popular sentiment is not to re-rehearse arguments for or against the death penalty, which have been canvassed at length elsewhere.¹⁷ Instead, it shows that the federal prohibition on the penalty’s reintroduction was no certain outcome, and was a significant political achievement. Seen in this light, the new legal impediment to reintroducing the death penalty is also of ongoing relevance and importance.

For this reason, and prompted by the absence of a comprehensive scholarly treatment of the topic, this article undertakes a full historical review of Australian legislation on the death penalty.¹⁸ It first charts the legal progress towards abolition, detailing the successive moves by Australian legislatures — colonial, state, territory and Commonwealth — to restrict and then completely abolish the death penalty as a sentencing option, culminating in the passage of the 2010 Act. It then turns to the question of whether Australia’s progress toward the abolition of the death penalty is complete. In this regard, we consider the extent to which Australia’s laws and practices on extradition and policing might involve Australian authorities in processes leading to death penalty sentences abroad. It is suggested that while the 2010 Act represents the last ‘necessary step’ (save for constitutional entrenchment) to abolish the death penalty within Australia, action can still be

¹² Kirby, above n 11, 818.

¹³ Ian McAllister and Juliet Pietsch, ‘Trends in Australian Political Opinion: Results from the Australian Election Study, 1987–2010’, Australian Election Study Website (Australian Institute for Public Policy, Australian National University) 54 <<http://aes.anu.edu.au/sites/default/files/Trends%20in%20Australian%20Political%20Opinion.pdf>>.

¹⁴ For a study on point, see William Bowers, Margaret Vandigan and Patricia Dugan, ‘A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer’ (1994) 22 *American Journal of Criminal Law* 77.

¹⁵ Cited in Marr, above n 4; Stephen Keim and Tiffany Henderson, ‘Australia and the death penalty’ (2011) 38(1) *Brief* 24.

¹⁶ Marr, above n 4.

¹⁷ See, eg, Barry Jones (ed), *The Penalty is Death: Capital Punishment in the Twentieth Century* (Sun Books, 1968); Ivan Potas and John Walker, ‘Capital Punishment’, Trends and Issues in Criminal Justice Paper No 3, Australian Institute of Criminology, February 1987; Byrnes, above n 2, 29–31. In the American context, see, eg, Hugo Bedau, *The Death Penalty in America: Current Controversies* (Oxford University Press, 1997).

¹⁸ For a review of the case law, see the analysis of the 16 reported capital case appeals that were contested before the High Court of Australia prior to the penalty’s abolition: Kirby, above n 11.

taken as a matter of principled opposition to the death penalty to ensure that Australian officials are not involved in the imposition of sentences in other nations.

II The Death Penalty in the Australian Colonies

The creation of the penal colony of New South Wales in 1788 brought the English criminal law to Australia's shores. Pursuant to the Charter of Justice issued for the new colony by Letters Patent of 2 April 1787, a Court of Criminal Jurisdiction had jurisdiction to deal with more serious offences 'according to the laws of this realm'. Those English laws were infamous for the high number of crimes that could bring about a sentence of death — in the 18th century of Blackstone's day at least 160, and at least 223 by 1810.¹⁹ The list of capital crimes extended to such acts as stealing hares and cutting down trees, under the *Black Act* of 1732.²⁰ However, for most such crimes the death sentence could be commuted. In Britain, capital punishment was normally applied only for around 25 offences.²¹ For murder, the death sentence was mandatory.

The law in New South Wales likewise enabled the Governor to commute sentences of death. The Charter of Justice provided that:

Execution be not done in any Capital Case whatever without the Consent of Our said Governor or in Case of his Death or Absence of our Lieutenant Governor and in Case Execution shall be suspended that the said Governor or Lieutenant Governor shall apply to us our Heirs or Successors for our or their direction therein.²²

Later, the Instructions to Governor Darling of 17 July 1825 affirmed that the Governor, acting with the advice of the Executive Council, had ultimate responsibility for ordering executions or granting mercy for capital crimes, with sole discretion for the carrying out of non-murder or treason executions.²³ In cases of murder and treason, the Governor could grant a temporary respite while the case was referred to London for signification of His Majesty's pleasure.

It has been estimated that as many as 80 people per year were executed in Australia during the 19th century.²⁴ As well as murder and manslaughter, the crimes included burglary, sheep stealing, forgery, sexual assaults and even, in one case, 'being illegally at large'.²⁵ The first man hanged in the colony, Thomas

¹⁹ Bruce Kercher, *Outsiders: Tales from the Supreme Court of NSW, 1824–1836* (Australian Scholarly Publishing, 2006), 5; Alex Castles, *An Australian Legal History* (Law Book Co, 1982), 56; Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford University Press, 4th ed, 2008), 42.

²⁰ Castles, above n 19, 56.

²¹ *Ibid.*

²² Letters Patent, 2 April 1787 (First Charter of Justice for New South Wales).

²³ Historical Records of Australia, Series I, xii, 124; see Tim Castle, 'Watching them hang: capital punishment and public support in colonial New South Wales, 1826–1836' (2008) 5(2) *History Australia* 1, 43.11, 48.2.

²⁴ Potas and Walker, above n 17.

²⁵ *Ibid.*; SK Mukherjee, John Walker and Evelyn Jacobsen, *Crime and Punishment in the Colonies: A Statistical Profile* (History Project Inc, 1986); LA Whitfeld, *Founders of the Law in Australia* (Butterworths, 1971) 5.

Barret in 1788, had been convicted of stealing food; he was one of 18 to be hanged under Governor Phillip's rule.²⁶ Tim Castle describes the rule of Governors Ralph Darling and Richard Bourke, from 1826 to 1836, as a 'heyday of capital punishment in the colony', with the Supreme Court of New South Wales imposing death sentences on 1296 offenders, of whom 363 were executed.²⁷ In one year, 1830, 'the 50 executions in New South Wales exceeded the 46 executions recorded for the whole of England and Wales in the same year.'²⁸ Those executed were almost entirely European men, principally convicts, but, as Alex Castles notes, there were also instances in the first half of the 19th century where the death penalty was imposed for what were described as 'acts committed during a war of reprisals then going on between the two races';²⁹ that is, the conflict between the white settlers and the continent's Aboriginal inhabitants.

The first curtailment of the penalty's use came with minor changes in 1833, which meant that capital punishment was no longer available for crimes such as cattle stealing, forgery and certain kinds of theft.³⁰ Then, in 1838, the colony adopted the major reforms that had been made to English law the preceding year, and capital punishment was repealed for a diverse range of crimes, such as nonviolent burglary, attempted murder 'though no bodily Injury effected' and offences under riot, smuggling and slave trading statutes.³¹ But in Van Diemen's Land (which had in 1825 become a separate colony) such reforms were resisted — in the mid-1830s its Legislative Council for a time refused to adopt fully the Act that had abolished capital punishment for horse, cattle and sheep stealing.³² Similarly, even after carnal knowledge, rape and sodomy ceased to be capital offences in England, Van Diemen's Land executed men for these crimes.³³

As the 19th century progressed, colonial newspapers reveal that debate about the penalty's continued use grew increasingly vigorous. In 1854, for example, the *South Australian Register* remarked that '[w]e may assume, as a starting point, that popular feeling is gradually manifesting itself against all capital punishments.'³⁴ *The Sydney Morning Herald* published the text of a speech that Victor Hugo had given before other French refugees on the isle of Jersey, including exhortations against the death penalty.³⁵ Newspapers covered reforms abroad³⁶ and public

²⁶ Castles, above n 19, 62.

²⁷ Castle, above n 23, 43.2.

²⁸ *Ibid.*

²⁹ Castle, above n 23, 43.11; cf Castles, above n 20, 267.

³⁰ *Imperial Acts Adoption Act 1833*, 4 Wm IV No 4 (NSW), 16 July 1833.

³¹ *Imperial Acts Adoption Act 1838*, 2 Vic No 10 (NSW), 28 August 1838, adopting inter alia *Capital Punishment Abolition Act 1837*, 1 Vic c. 91, 17 July 1837; *Offences against the Person Act 1837*, 1 Vic c. 85, 17 July 1837; *Burglary Act 1837*, 1 Vic c. 86, 17 July 1837; *Burning of Buildings, etc. Act 1837*, 1 Vic c. 89, 17 July 1837; and *Punishment of Offences Act 1837*, 1 Vic c. 91, 17 July 1837.

³² Castles, above n 20, 261. As for the other Australian colonies, it is known that the first execution in South Australia took place in 1838, for the crime of shooting at the Sheriff with intent to kill. In Melbourne the first executions took place in January 1842, when two Aboriginal men were hanged for murder: *ibid* 244.

³³ *Ibid* 261–2.

³⁴ 'Capital Punishments', *South Australian Register* (Adelaide), 20 December 1854, 2.

³⁵ 'Speech of Victor Hugo' *The Sydney Morning Herald* (Sydney), 14 September 1853, 3.

³⁶ For example, the *Empire* reported: '[a] bill abolishing the death penalty was ordered to be engrossed in the Assembly of Wisconsin, on the 14th March, by a vote of 46 to 27'. 'American

lectures at home.³⁷ And while the press continued to publish voyeuristic accounts of capital punishments, many of these took on a condemnatory character: an 1856 report in *The Argus* on an execution at London's Old Bailey, for example, ran under the headline 'Horrible Scene at an Execution';³⁸ and an 1870 *Australian Town and Country Journal* report on an execution in Madison County was titled 'Hung while Insensible'.³⁹

The next legislative step in reform of capital punishment was the abolition of public executions. In this, four Australian colonies moved ahead of developments in Britain. On 17 August 1853, the New South Wales Legislative Council passed an *Act to Regulate the Execution of Criminals 1853* (NSW).⁴⁰ The Act was an amendment to existing British legislation, which meant that royal assent was required before the Act could become law. After a delay, the Act came into force on 11 January 1855. Victoria and Tasmania likewise passed the reform, with the *Private Execution Act 1855* (Vic) and the *Criminals' Execution Act 1855* (Tas).⁴¹ The move proved influential in London; at the 1866 Capital Punishment Commission, Sir George Grey cited the Australian shift in arguing that Britain should follow suit.⁴² Two years later, it did. The shift also crystallised early support in the colonies for the outright abolition of capital punishment — the abolitionist press (particularly the *People's Advocate* and the Henry Parkes-owned *Empire*) argued that, while the abolition of public executions was to be welcomed, the death penalty should be ended altogether.⁴³

Legislative change did not move only in one direction. As John McGuire has shown, public executions of non-European (particularly Aboriginal and Islander) offenders continued in some colonies. At first this occurred illegally, in contravention of the laws abolishing public executions: in Moreton Bay in 1855, for example, two Aboriginal men, Dick and Chamery, were publicly executed before other Aboriginal persons, some of whom were made to watch.⁴⁴ And in South Australia's Streaky Bay in 1860, an Aboriginal man named Manyelta was publicly executed despite the colony's reform of two years previous.⁴⁵ South Australia and Western Australia then moved to enact exceptions to their bans on

Items', *Empire* (Sydney), 25 June 1853, 8. Likewise, *The Sydney Morning Herald* reported on the Wisconsin Assembly's move to reverse the reform: 'The Death Penalty in Wisconsin', *The Sydney Morning Herald* (Sydney), 19 October 1855, 3.

³⁷ For example, the *Empire* gave lengthy coverage to a lecture on abolition by Frederick Lee. 'Lecture on the Abolition of Capital Punishment', *Empire* (Sydney), 7 August 1865, 5.

³⁸ 26 June 1856, 4.

³⁹ 19 March 1870, 22.

⁴⁰ See *Votes and Proceedings of the Legislative Council of New South Wales*, vol 1, 1853, 161, and parliamentary debates reported in *The Sydney Morning Herald* (Sydney), 2 July – 18 August 1853.

⁴¹ South Australia abolished public executions with its *Act to Regulate the Execution of Criminals 1858* (SA). Western Australia did the same in 1870: *An Act to Provide for Carrying Out of Capital Punishment within Prisons 1871* (WA). In the Moreton Bay settlement, which separated from New South Wales to become the self-governing colony of Queensland in December 1859, the New South Wales Act applied from 1855.

⁴² 'Report of the Capital Punishment Commission', *Great Britain, Parliamentary Papers*, vol 21, 1866, 219.

⁴³ John McGuire, 'Judicial violence and the "civilizing process": Race and the transition from public to private executions in Colonial Australia' (1998) 111 *Australian Historical Studies* 187.

⁴⁴ *Ibid* 197.

⁴⁵ *Ibid* 200.

public executions: South Australia passed the *Act to Amend an Act to Regulate the Execution of Criminals 1861* (SA), which permitted public executions of capitally convicted Aboriginal people at the scene of their crime.⁴⁶ Western Australia did the same by its *Capital Punishment Amendment Act 1871 Amendment Act 1875* (WA).⁴⁷ McGuire also shows that race also figured in commuting decisions; between 1895 and 1906 in Queensland, ‘33 per cent of all Islanders sentenced to death went to the gallows, compared with only 19 per cent of Europeans and 14 per cent of Aborigines’.⁴⁸

In 1861 England reduced the number of capital crimes to five: murder, treason, espionage, arson in royal dockyards, and piracy with violence.⁴⁹ Yet the colonies lagged. New South Wales was an illustrative example. In the mid-1860s there were moves by members of Parliament to assimilate the English changes into New South Wales law, such as the bill introduced by John Plunkett.⁵⁰ In 1871, a law reform commission proposed a draft bill that would have retained the death penalty for ‘certain more flagitious acts’ while taking it away for cases of murder ‘not actually malicious’.⁵¹ In 1877, during discussions on a Criminal Law Consolidation Bill, a clause that would have abolished the death penalty for the crime of rape was rejected.⁵² The penalty’s outright abolition was moved for, unsuccessfully, numerous times.⁵³ Other colonies saw similar (and similarly unsuccessful) attempts.⁵⁴

⁴⁶ The debates record some opposition: see McGuire, above n 43, 197.

⁴⁷ *Ibid* 201.

⁴⁸ *Ibid* 208.

⁴⁹ This was achieved by several enactments in 1861: *Accessories and Abettors Act 1861*, 24 & 25 Vic c. 94; *Criminal Statutes Repeal Act 1861*, 24 & 25 Vic c. 95; *Larceny Act 1861*, 24 & 25 Vic c. 96; *The Malicious Damage Act 1861*, 24 & 25 Vic c. 97; *Forgery Act 1861*, 24 & 25 Vic c. 98; *Coin Act 1861*, 24 & 25 Vic c. 99; *Offences Against the Person Act 1861*, 24 & 25 Vic c. 100 (collectively, the *Criminal Law Consolidation Acts*, 24 & 25 Vic c. 94 to c 100). The death penalty remained mandatory for treason and murder unless commuted. The dockyards provisions were to be found in *The Dockyards, etc, Protection Act 1772*, 12 George III c. 24. Military law created yet other offences; eg, cowardice in the army: see below n 1744.

⁵⁰ The bill and debate upon it is mentioned in ‘The Punishment of Death’, a letter from Frederick Lee to *The Argus* (Melbourne), 9 December 1867, 6.

⁵¹ ‘Law Reform Commission’, *The Sydney Morning Herald* (Sydney), 5 June 1871, 3.

⁵² ‘Criminal Law Consolidation Bill’, *The Sydney Morning Herald* (Sydney), 31 May 1877, 3. There continued to be a division of views about the topic in Parliament: see ‘Thursday, May 22, 1879’, *The Sydney Morning Herald* (Sydney) 22 May 1879, 4, 5.

⁵³ For example, in March of 1870, Dr William Brookes introduced a bill into the New South Wales Parliament that would have abolished capital punishment for all offences: see reports in the *Empire* (Sydney), 10 March 1870, 2 and the *Daily Southern Cross* (Auckland), 7 March 1870, 4. In the last decade of the century, *The Bulletin* co-founder John Haynes was an especially determined proponent: he introduced such bills in the years 1895, 1896 and 1898. See ‘Capital Punishment. Its Abolition Moved For’, *Australian Town and Country Journal* (Sydney), 26 October 1895, 16; ‘New South Wales Parliament. Broken Hill Time. Abolition of Capital Punishment,’ *The Advertiser* (Adelaide), 10 June 1896, 5; ‘Parliament’, *Clarence and Richmond Examiner* (Grafton), 24 October 1896, 5; ‘Capital Punishment Abolition Bill’, *The Sydney Morning Herald* (Sydney), 19 October 1898, 5; ‘New South Wales Legislative Assembly. Capital Punishment. Mr Haynes’s Bill,’ *The Advertiser* (Adelaide), 19 October 1898, 4.

⁵⁴ In July of 1895, a Mr Woods moved such a proposal in the South Australian Legislative Assembly: ‘Capital Punishment Debate in the Assembly’, *South Australian Register* (Adelaide), 1 November 1895, 7. In Tasmania in 1876, a Mr Murray moved unsuccessfully to ask the Attorney General if he would bring in a bill to abolish capital punishment in Tasmania: ‘Capital Punishment’, *Launceston Examiner* (Launceston), 7 October 1876, 3. In Queensland in September 1899, a Mr Lesina moved

Colonial Laws at Federation

There was no common position on the use of the death penalty in the Australian colonies at the time of Federation in 1901. Extensive provision remained in each colony for the death penalty, but there was great variation as to exactly which crimes could give rise to the sanction.

In Queensland there were five capital crimes under the *Criminal Code Act 1899* (Qld):⁵⁵ treason (s 37); piracy (s 81); attempted piracy with personal violence (s 82); murder and wilful murder (s 305). By then, the death penalty was no longer available for rape, which was punishable by imprisonment with hard labour for life (s 348).

In Tasmania, there were eight capital crimes. Seven were created by a consolidating criminal statute:⁵⁶ murder (including petit treason, which is the now obsolete offence of treason committed by inferiors against their superiors, but not against the Sovereign, such as the killing of a master by a servant or a husband by a wife) (ss 1, 8);⁵⁷ attempts to murder by administering poison or wounding (s 9); destroying or damaging a building with gunpowder (s 10); setting fire to or casting away a ship (s 11); attempting to administer poison, or shooting or attempting to shoot, or attempting to drown etc with attempt to murder (s 12); attempted murder by any other means (s 13); and sodomy (s 59). Additionally, piracy with attempted murder was a capital offence.⁵⁸ Treason, however, was not.⁵⁹

In Victoria, there were nine capital crimes under the *Crimes Act 1890* (Vic): murder (s 3); including petit treason (s 7); attempted murder by poisoning or wounding (s 8); attempted murder by setting fire to or destroying ships (s 10); rape (s 42); carnally knowing and abusing a girl under the age of 10 (s 43); buggery 'either with any person under the age of fourteen years or with or upon any person with violence and without the consent of such person' (s 58); robbery with wounding (s 111); burglary with wounding (s 122); and setting fire to a house with anyone in it (s 171).⁶⁰

an amendment that would have abolished the death penalty: 'Criminal Code Bill', *The Brisbane Courier* (Brisbane), 29 September 1899, 5, 6.

⁵⁵ 63 Vic No 9.

⁵⁶ *An Act to consolidate and amend the Legislative Enactments relating to Offences against the Person* (Tas), 27 Vic No 5, 31 July 1863. That statute was amended by the *Offences against the Person Act 1885* (Tas), 49 Vic No 23 and the *Conspiracy and Protection of Property Act 1889* (Tas) 53 Vic No 28. The latter statute repealed provisions that previously imposed the death penalty for rape (s 45).

⁵⁷ Colonial statutes commonly specified that the old offence would be deemed to be 'murder only' and punishable in the same way as murder — that is, by death. In the Tasmanian statute, for example, the section read: 'Every offence which, before the commencement of the Act of the Imperial Parliament of the 9th George the 4th, c. 31, would have amounted to Petit Treason shall be deemed to be Murder only and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, proceeded against, tried and punished as principals and accessories in Murder.'

⁵⁸ *An Act to amend certain Acts relating to the Crime of Piracy* (Tas) 1 Vic c. 88, 17 July 1837, s 2.

⁵⁹ *An Act for the better Security of the Crown and Government of the United Kingdom* (Tas) 11 Vic c. 12, 17 September 1868.

⁶⁰ The *Crimes Act 1890* (Vic) made no provision as to treason. As to whether that or any offence was made a capital crime by some other statute, see below n 1068 ff.

In South Australia (which at that time included what is now the Northern Territory) there were only two capital offences: murder and ‘piracy and attempt to murder’.⁶¹ Again, murder included petit treason.⁶²

In Western Australia, five capital offences arose under adopted Imperial law and Western Australian statute:

- (i) Under the British *Offences against the Person Act 1861*, 24 & 25 Vic c. 100, as adopted, murder;⁶³
- (ii) under The Criminal Law Consolidation Ordinance 1865 (WA),⁶⁴ attempted murder by administering poison or wounding (s 2), rape (s 3) and burglary with violence (s 4); and
- (iii) under An Ordinance for the better security of the Crown and Government (WA),⁶⁵ treason (s 1).⁶⁶

Finally, in New South Wales 11 offences were punishable by death. Nine arose under the *Criminal Law Amendment Act 1883* (NSW):⁶⁷ murder (including murder committed recklessly, but not manslaughter) (s 9); attempted murder (s 16); acts done to property with like intent (s 17); rape (s 39); carnally knowing a girl under ten (s 41); burglary with intent to murder or cause grievous bodily harm (s 103); setting fire to a church or dwelling knowing a person to be inside (s 177); setting fire to or destroying a ship or vessel carrying persons (s 212); and exhibiting a false light or signal with intent to bring a vessel into danger (s 215).⁶⁸ Additionally, treason and arson in royal dockyards were capital crimes under applicable Imperial law.⁶⁹

III Abolition of the Death Penalty in the States and Territories

At Federation, the colonial laws providing for the death penalty became part of the law of each of the new Australian states. In the new states, despite the range of

⁶¹ *Criminal Law Consolidation Act 1876* (SA), ss 5, 8 and 227 respectively. South Australia passed amendments to its criminal law in 1885, but these did not affect capital punishment: *An Act to Amend the Criminal Law Consolidation Act 1876 and the Justices Procedure Amendment Act 1883-1884* (SA) No 358 of 1885, assented to 11 December 1885. Cf GH Castle and AC Thomas, *Index to Public Acts and Ordinances of the Province of South Australia* (CE Bristow, Government Printer, 1894) 22. As to the application of South Australian law in the Northern Territory, see: *Northern Territory Justice Act 1884* (SA) 47 and 48 Vic No 311, s 2; *Northern Territory Justice Act 1875* (SA), incorporated by the *Northern Territory Justice Act 1874* (SA).

⁶² *Criminal Law Consolidation Act 1876* (SA), s 19.

⁶³ The statute was adopted in Western Australia by virtue of Schedule A to *The Criminal Law Consolidation Ordinance 1865* (WA), 29 Vic No 5. See also above n 49.

⁶⁴ 29 Vic No 5, 7 July 1865. This remained in force as at 1900.

⁶⁵ 32 Vic No 10, 5 August 1868.

⁶⁶ See also 33 and 34 Vic c. 23, as adopted by 37 Vic No 8, 1873.

⁶⁷ 46 Vic No 17.

⁶⁸ As to debates over s 9, see ‘Legislative Assembly. Wednesday, March 21’, *The Sydney Morning Herald* (Sydney), 22 March 1883, 7).

⁶⁹ *Treason Act 1795*, 36 Geo III and c. 7; *Treason Act 1817*, 57 Geo III, c. 6, as continued in New South Wales by 31 Vic No 25, s 1 (preserving offences against the person of the Sovereign); *The Dockyards, etc, Protection Act 1772*, 12 George III c. 24.

capital offences, the death penalty was usually carried out only for murder. Moreover, from Federation the penalty was less frequently used, even in murder cases. In the 20th century, 114 prisoners were executed in Australia.⁷⁰ Eventually, each of the states and territories, as well as the new Commonwealth created at Federation, enacted laws to abolish the penalty.

Queensland

Queensland was the first Australian state to abolish the death penalty. The last execution in Queensland was in 1913, the 18th hanging in the State since Federation.⁷¹ From 1915, all death sentences were commuted by the Labor Government, until in 1922 the abolition of the Legislative Council, the upper house of the Queensland Parliament, made it possible to repeal the death penalty entirely.⁷²

The bill to achieve this was introduced into the Legislative Assembly by Attorney General John Mullan on 11 July 1922.⁷³ Mullan moved the second reading on 20 July 1922.⁷⁴ Vigorous debate ensued: the transcript fills some 20 pages of the parliamentary record, and the House did not adjourn that evening until 10.26 pm. Among the many arguments put, Mullan argued that public opinion was no longer behind the death penalty, that juries often showed disinclination to convict murderers because of the death penalty, and that the whole history of criminology showed that harsh punishment did not stamp out crime.⁷⁵ Many argued against these propositions, and objected that, as *The Brisbane Courier* put it, '[t]he tendency of the government was to make things lighter for the criminal classes.'⁷⁶ The bill passed with a narrow majority in favour, with 33 'ayes' to 30 'noes'.⁷⁷

The bill excited opposing passions out of Parliament. *The Brisbane Courier* editorialised against Labor's 'misdirected fervour', while the *Worker* decried how 'Torydom to a man howled for the retention of the hangman and his ghastly duties'.⁷⁸

The *Criminal Code Amendment Act 1922* (Qld) received assent on 31 July 1922. It provided, by s 2, that: 'The sentence of punishment by death shall no longer be pronounced or recorded, and the punishment of death shall no longer be inflicted.' For the death penalty was substituted imprisonment for life without mitigation. Section 3 amended the Criminal Code accordingly. The non-Labor

⁷⁰ For a breakdown of these by states and territories, and by year, see Jones, above n 17, 257.

⁷¹ Jones, above n 17, 271.

⁷² *Ibid.*

⁷³ Queensland, *Parliamentary Debates*, Legislative Assembly, 11 July 1922, 171. Cf 'State Parliament. The Week's Business', *Worker* (Brisbane), 20 July 1922, 14.

⁷⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 20 July 1922, 393–414. Cf 'Death Penalty. Queensland Abolition Bill', *The Register* (Adelaide), 21 July 1922, 8.

⁷⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 20 July 1922, 393–4. Cf reportage in 'Serious Crimes. The Death Penalty', *The Brisbane Courier* (Brisbane), 21 July 1922, 4.

⁷⁶ 'Serious Crimes. The Death Penalty', above n 75.

⁷⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 20 July 1922, 414, and reported in 'Death Penalty. Queensland Abolition Bill,' above n 74.

⁷⁸ 'A Dangerous Kind of Freedom', *The Brisbane Courier* (Brisbane), 24 July 1922, 4; 'The "Hanging Party". Bloodthirsty Tories Clamor for Death Penalty', *Worker* (Brisbane), 27 July 1922, 11.

Governments of 1929–32 and 1957 onwards apparently made no attempt to revive the death penalty.⁷⁹

Tasmania

The next state to abolish the death penalty for all crimes was Tasmania. In February 1924, when the Parliament moved to introduce a Criminal Code substantially similar to that in force in Queensland, the most vigorous debate among Members was over whether the death penalty should continue to form a part of the law of the State.⁸⁰ The outcome was narrowly in favour of retention. On 28 February, a vote on the clause met with 11 ‘ayes’ and 11 ‘noes’, with the chairman deciding the question by casting his vote with the ‘ayes’.⁸¹ The clause was therefore passed as printed, and was given a third reading on the same day.⁸² The Criminal Code, enacted by the *Criminal Code Act 1924* (Tas),⁸³ contained two capital offences: treason (s 56); and murder (s 158).

The death sentence was thus retained, but from 1933, when Labor came to power, the State was de facto abolitionist, commuting all death sentences imposed, with the exception of one hanging in 1946. Describing the context for this exception, Barry Jones (who served as a member of the Victorian and Federal Parliaments and Minister in the Hawke government) wrote:

a young man ... raped and strangled a small girl in the Launceston cemetery. Public feeling ran very high and the Government seemed likely to suffer in the elections of 1946 for its quasi-abolitionist position. Accordingly [the convicted man] was hanged, the Government apparently having decided that Launceston was worth a neck. The ALP retained a majority of seats in the Bass electorate.⁸⁴

With the 1964 House of Assembly election, Labor won a 10th term in office in the State, but it lacked the support of the Legislative Council to abolish capital punishment. The reform was rejected 12 times in the Upper House before the Attorney General, R F Fagan, succeeded on the 13th, in 1968 — a success that Fagan

⁷⁹ Jones, above n 17, 271.

⁸⁰ See eg ‘Criminal Code Before Assembly’, *The Examiner* (Launceston), 29 February 1924, 6.

⁸¹ Since Tasmania at this time kept no formal record of parliamentary debates, contemporary newspaper reports provide the best records. Adelaide’s *The Advertiser*, however, reported erroneously that the death penalty was abolished: ‘A New Criminal Code. Death Penalty Abolished in Tasmania’ *The Advertiser* (Adelaide), 29 February 1924, 12. In fact, as is clear from the Tasmanian reports, the Attorney General, Albert Ogilvie, moved to postpone the clause that would have imposed the penalty, but the vote on postponement was lost, and the subsequent vote on ‘the question that the clause be agreed to the division [of the Committee]’ was won, on the numbers given in the text above: ‘Criminal Code Before Assembly’, *The Examiner* (Launceston), 29 February 1924, 6. See also ‘Criminal Code Bill. Speech by Attorney General; Simplified Law and Procedure. Old Forms Dropped. The Second Reading Carried’, *The Mercury* (Hobart), 29 February 1924, 3.

⁸² *The Mercury*, above n 81, 3.

⁸³ 14 Geo V No 69.

⁸⁴ Jones, above n 17, 271. Jones states that the offender’s name was Maughan, but contemporary reports give it as Frederick Henry Thompson, a 32 year-old waterside worker, with the name of the child being Evelyn Mary Maughan: ‘Death Penalty Decision’, *Army News* (Darwin), 24 December 1945, 2.

regarded as his greatest achievement in politics.⁸⁵ According to Fagan's entry in the *Australian Dictionary of Biography*, '[h]is speech on capital punishment is regarded as one of the finest ever given in the House of Assembly, but because there was no Hansard in the Tasmanian parliament at the time, it was unrecorded'.⁸⁶

The statute so passed was the *Criminal Code Act 1968* (Tas). It provided, by s 2, that '[a]fter the commencement of this Act, the sentence of punishment by death shall no longer be inflicted, in respect of crimes committed against the laws of the State.' Section 3 amended s 56 of the Criminal Code so as to replace the death penalty for the offence of treason with 'imprisonment for the term of his natural life'. Section 4 similarly amended s 158 of the Code, which dealt with murder. Sections 5–9 made consequential amendments to Code provisions regarding sentencing and execution of sentence, and s 10 made consequential amendments to other statutes.⁸⁷

The Northern Territory

The Northern Territory was at Federation a part of South Australia and subject to its laws.⁸⁸ On 1 January 1911, the Territory was transferred to Commonwealth control, but the criminal law that continued to apply was the *Criminal Law Consolidation Act 1876* (SA), as amended from time to time for the Northern Territory. In 1939, the Commonwealth amended the South Australian statute, not to remove the death penalty as a sentence, but to specify that where an Aboriginal person was convicted of murder, the sentence was not mandatory.⁸⁹ No change was made to ss 19 (petit treason) or 227 (piracy and attempted murder). In 1968, the new Northern Territory Legislative Council amended the law further by abolishing the death penalty for the old offence of 'piracy and attempt to murder', substituting in lieu imprisonment for life with hard labour.⁹⁰ At the same time, it reworded the

⁸⁵ Michael Field, 'Fagan, Roy Frederick (1905–1990)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University <<http://adb.anu.edu.au/biography/fagan-roy-frederick-12473/text122435>>. See also Jones, above n 17, 271.

⁸⁶ Field, above n 85.

⁸⁷ *Jury Act 1899* (Qld) 63 Vic No 32; *Justices Act 1959* (Qld); *Mental Health Act 1963* (Qld); *Prison Act 1868* (Qld).

⁸⁸ *Northern Territory Justice Act 1884* (SA) 47 and 48 Vic No 311, s 2. See also *Northern Territory Justice Act 1875* (SA), incorporated by the *Northern Territory Justice Act 1874* (SA). It is unclear whether the *Act to Amend an Act to Regulate the Execution of Criminals 1861* (SA), which permitted public executions of capitally convicted Aboriginal persons at the scene of the crime, applied in South Australia. Indexes of South Australian statutes applicable in the Territory dating up to and including 1968 do not list it. In any event, in the Territory as in South Australia, this exception was not used in the 20th century.

⁸⁹ By s 7 of the amending Ordinance, the *Criminal Law Consolidation Act 1876* (SA) s 6 was amended by adding the proviso that: 'Provided that, where an aboriginal is convicted of murder, the Court shall not be obliged to pronounce sentence of death but, in lieu thereof, may impose such penalty as, having regard to all the circumstances of the case, appears to the Court to be just and proper.' The section also added a proviso permitting the Governor-General, acting on advice, to postpone the execution of 'any sentence of death'.

⁹⁰ *Criminal Law Consolidation Ordinance (No 2) 1968* (SA), No 67 of 1968, s 227. Section 3 of the ordinance also reworded the murder sentencing provisions, but made no substantive change. The statute so amended was to be cited as '*The Criminal Law Consolidation Amendment Act and Ordinance 1885 to 1969*': *Criminal Law Consolidation Amendment Ordinance 1969* (NT), No 39 of 1969, s 3; *Criminal Law Consolidation Amendment Ordinance 1969* (NT), No 47 of 1969, s 3.

murder sentencing provisions, but made no substantive change. Murder was still a capital offence.

Despite the death penalty's continued availability, it was infrequently carried out. The records show that one person was hanged in the Northern Territory in 1913.⁹¹ The Territory's only other — and last — executions were in 1952, when two young European migrants were hanged in Darwin for the murder of a taxi driver.⁹² All other death sentences imposed in the Territory were commuted.

With the start of the 1970s, the prospect of abolitionist bills being introduced at the federal level — with effect in the Territory — prompted the introduction of abolitionist bills in the Territory's Legislative Council.⁹³ On 5 March 1970, Richard ('Dick') Ward, then a Labor politician and later a judge, first introduced The Criminal Law Consolidation Bill.⁹⁴ When Ward gave the bill its second reading, he noted that he had discussed the bill with Commonwealth Senator Lionel Murphy and said that he wished for the Legislative Council of the Northern Territory to legislate for itself, rather than have the Commonwealth do so on its behalf. Ward then made lengthy remarks that traversed the main abolitionist and retentionist arguments and the extensive literature dealing with both, before closing with the words: 'To the end of history, murder shall breed murder, always in the name of right and honour and peace, until the gods are tired of blood and create a race that can understand.'⁹⁵

Debate on the bill was adjourned, and the Council did not consider the bill again until 13 December 1972, when Ward referred briefly to his earlier speech.⁹⁶ The Council debated the bill on 20 February 1973. Members referred again to the expected introduction of a federal bill; Crown Law Officer Clement O'Sullivan said, 'Notwithstanding that the bill to be introduced into the federal parliament will extend to the Northern Territory, the government hopes that this Legislative Council will pass this bill.'⁹⁷ There was opposition from Godfrey Letts, who advocated for the penalty's retention for some (but not all) cases of murder, citing the penalty's deterrence effect.⁹⁸ Opposition was also voiced by Rupert Kentish: 'I still believe that the death penalty is a deterrent, not to the person who receives the punishment but to others who are contemplating deliberate, cold-blooded murder.'⁹⁹ Remarks in support of the bill came from Alline Lawrie, Bernard Kilgariff and Eric Marks as well as Ward; these Members rejected the deterrence argument and cited moral reasons for the penalty's abolition.¹⁰⁰ Both Lawrie and Kilgariff, however, also spoke against the fact that 'the Attorney-General has seen

⁹¹ Walton, above n 11, 2.

⁹² Northern Territory, *Hansard*, Legislative Council, 25 March 1970, 387 (Richard Ward).

⁹³ As to the bill before the Commonwealth Senate at that time, see Commonwealth of Australia, *Hansard*, Senate, 21 April 1970, 954; 22 April 1970, 989 (Lionel Murphy); and below n 177 with accompanying text.

⁹⁴ Northern Territory, *Hansard*, Legislative Council, 5 March 1970, 231 (Richard Ward).

⁹⁵ *Ibid* 25 March 1970, 369, 378–83 (Richard Ward).

⁹⁶ *Ibid* 13 December 1972, 1265–6 (Richard Ward).

⁹⁷ *Ibid* 20 February 1973, 77 (Clement O'Sullivan).

⁹⁸ *Ibid* 78 (Godfrey Letts).

⁹⁹ *Ibid* 79 (Rupert Kentish).

¹⁰⁰ *Ibid* 79–81.

fit to state that if we do not agree to his wishes he will override us with federal legislation.’¹⁰¹ The vote was passed with 12 ‘ayes’ and 3 ‘noes’.¹⁰²

The *Criminal Law Consolidation Ordinance 1973* (NT) came into force on 5 April 1973.¹⁰³ Section 5 amended ‘*The Criminal Law Consolidation Act and Ordinance 1876 to 1969*’ so as to remove the death penalty for the offence of murder, inserting instead ‘imprisonment for life with hard labour, which sentence cannot be mitigated or varied by the court’. No capital crimes remained on the Northern Territory’s statute-book.

Victoria

The nine capital crimes in Victoria’s laws at Federation were continued in the *Crimes Act 1915* (Vic),¹⁰⁴ and again in the *Crimes Act 1928* (Vic).¹⁰⁵ As to whether these *Crimes Act* offences exhausted the list of capital crimes, however, confusion persists. In 1968 Barry Jones wrote that, until changes in 1949, ‘twelve crimes’ were capital in the State, but he did not list them.¹⁰⁶ The figure would later be echoed, again without detail, by Premier Rupert Hamer in Parliament.¹⁰⁷ It is possible that treason, for example, might have been a capital crime under some other statute.¹⁰⁸ Indeed, as shall be seen, later legislators appeared to recognise treason as an existing capital crime. However, no such law is listed in contemporary indexes of extant statutes, and none of the amending statutes later enacted expressly amended any criminal statute other than the *Crimes Act*.

In any event, new, but unsuccessful, attempts to abolish or curtail the death penalty came in 1929, when bills were introduced in both the lower and upper houses. The Crimes Bill, debated in the Legislative Assembly, would have ended the penalty for all offences except murder and ‘serious crimes against young girls’, but it apparently languished.¹⁰⁹ The Capital Punishment Abolition Bill in the Legislative Council would have abolished the penalty altogether, but it was

¹⁰¹ Ibid 79 (Alline Lawrie, Bernard Kilgariff).

¹⁰² Ibid 81.

¹⁰³ *Criminal Law Consolidation Ordinance 1973* (NT) s 3; *Northern Territory Government Gazette* No 14 of 5 April 1973, 128.

¹⁰⁴ The section numbers were as follows: murder (s 3), petit treason (s 7), attempted murder by poisoning or wounding (s 8), attempted murder by setting fire to or destroying ships (s 10), rape (s 41), carnally knowing and abusing a girl under the age of ten (s 42), robbery with wounding (s 113), buggery (s 65(1)), burglary with wounding (s 124) and setting fire to a house with anyone in it (s 187).

¹⁰⁵ The section numbers remained the same, except for rape (s 40).

¹⁰⁶ Jones, above n 17, 259, citing only ‘the Victorian Crimes Act’.

¹⁰⁷ Victoria, *Hansard*, Legislative Assembly, 4 March 1975, 3820 (Rupert Hamer, referring to changes ‘in 1949 when twelve crimes, which formerly carried the death penalty, were struck from the list’).

¹⁰⁸ The *Crimes Acts* of 1915 and 1928 contemplated that capital crimes created under other statutes might continue. In both consolidations, s 507 said: ‘No person convicted of felony shall suffer death unless it is for some felony which was punishable with death at the commencement of this Act or which shall by some Act hereafter to be passed be made punishable with death.’

¹⁰⁹ Victoria, *Hansard*, Legislative Assembly, 22 August 1929, 1054 (Ian Macfarlan, Attorney General, giving the second reading speech). The two capital crimes to be retained were not specified in the parliamentary record, but appear from news reports of the day: eg ‘News in Brief’, *The Mercury* (Hobart), 23 August 1929, 8.

defeated by 14 votes to four.¹¹⁰ The penalty thus continued to exist for a range of crimes. Yet nearly all of those sentenced to death for crimes other than murder had their sentences commuted.¹¹¹ Decisions as to whether a capital offender would hang depended on the Cabinet composition at the time. In Victoria the ALP was abolitionist, while the Country Party was retentionist, and the Liberal Party observed the status quo of de facto abolition.

In 1949, the law was amended to abolish the death penalty for all offences but murder and (according to the Attorney General, T D Oldham) treason.¹¹² It additionally provided that the death sentence could not be carried out when the accused was under the age of 18 years. In moving the bill in the Legislative Assembly, the Attorney General explained:

The history of this measure is that it was recommended by one of the committees set up by the Chief Justice to deal with law reform, and it was presented during the last session of Parliament, together with an explanatory memorandum ... Briefly summarized, the Bill proposes to abolish the death penalty for all crimes except murder and treason.¹¹³

Abolitionists supported the proposal, notwithstanding that the Bill did not abolish the penalty altogether.¹¹⁴ Thereafter, the *Crimes Act* provided by s 465 that: 'No person shall be sentenced to death except for treason or murder.'¹¹⁵ As before, however, the 1957 and 1958 versions of the *Crimes Act* did not actually create the offence of treason.

From 1951 until 1967 Victoria commuted every death penalty imposed in the State.¹¹⁶ This changed with the case of Ronald Ryan, who would become known as the last man hanged in Australia. Ryan had been convicted of shooting a prison guard during an escape attempt, although his defence counsel, Philip Opas QC, always

¹¹⁰ Victoria, *Hansard*, Legislative Council, 24 July 1929, 408 (E L Kiernan, moving the introduction of the Capital Punishment Abolition Bill); 23 October 1929, 2504–6 (E L Kiernan, giving the second reading speech), 2508 (voting).

¹¹¹ Jones, above n 17, 259.

¹¹² *An Act to amend the Law relating to Crimes and Criminal Offenders 1949* (Vic), abolishing the death penalty for the offences of attempted murder by poisoning or wounding (s 2(a)), attempted murder by setting fire to or destroying ships (s 2(b)), rape (s 2(c)), carnally knowing and abusing a girl under the age of ten (s 2(d)), buggery (s 2(g)), robbery with wounding (s 2(f)), burglary with wounding (s 2(g)), and setting fire to a house with anyone in it (s 2(h)). The *Crimes Act 1928* (Vic) so amended was thereafter to be cited as the *Crimes Act 1949* (Vic).

¹¹³ Victoria, *Hansard*, Legislative Assembly, 30 March 1949, 67. The Attorney General added that on the law as it stood, in addition to murder and treason, the crimes that automatically carried the death sentence were 'administering poison or wounding with intent to murder; setting fire to a ship with intent to murder; certain sexual crimes; robbery with wounding; burglary with wounding; and setting fire to a house with persons being therein.' The sub-committee of the Chief Justice's Law Reform Committee, which had submitted its report on 24 October 1947, had said: 'It is felt that death penalties so seldom carried out only serve to bring the law into disrepute and might well be abolished.' See Victoria, *Hansard*, Legislative Assembly, 28 April 1949, 569 (HS Bailey).

¹¹⁴ Victoria, *Hansard*, Legislative Assembly, 28 April 1949, 576 (Samuel Merrifield, saying: 'We of the Labour party [sic] express generally the principle of abolition of capital punishment, but at the same time we do not argue against the Bill in that respect because the progress it makes is good along the desired path.')

¹¹⁵ *Crimes Act 1957* (Vic); *Crimes Act 1958* (Vic).

¹¹⁶ Ronald Bower, 'Inconsistency and Political Convenience' (2011) February *Brief* 6.

maintained that his client was an innocent man.¹¹⁷ Premier Henry Bolte, with an impending State election, refused to commute the sentence, and Ryan was executed on 2 February 1967 in Melbourne. As Barry Jones relates, the case rallied abolitionists, who had already been galvanised by their earlier (and successful) campaign to win a reprieve for Robert Tait in 1962.¹¹⁸ That campaign had seen the formation of the Anti-Hanging Committee, and it had also drawn support from newspapers, professional, union and student groups, as well as some churches.

In the 1970s, with the Liberal Party still in government in the State and only 10 Labor members in the 33-seat Legislative Council, abolition was at last achieved.¹¹⁹ On 4 March 1975, the Premier Rupert Hamer moved to introduce a Bill in the Legislative Assembly to abolish capital punishment for the remaining capital crimes, treason and murder.¹²⁰ The Bill was read a second time on the same day, and the Premier said:

This is a Bill to abolish capital punishment — to wipe it from our statutes, as has been done already in every other Australian State except one, South Australia, in the whole of Europe except Spain and France, in Israel and New Zealand, and in many of the American States.¹²¹

After referring to the 1949 reduction in capital crimes, the Premier told the Assembly: ‘Now the time has come to take the final step.’¹²² After vigorous debate — and unsuccessful attempts by the Leader of the Country Party, Peter Ross-Edwards, to push for yet more exceptions and reports — the Assembly passed the Bill by 37 votes to 31.¹²³ In the Legislative Council, the Bill’s second reading was given by another Liberal Party Member and Minister, Murray Byrne, who observed, ‘certainly it is a unique occasion when, for the first time in the history of this Parliament, a move to abolish capital punishment has been initiated from this side of the Chamber, not necessarily from the Government, but certainly from a member of the Government.’¹²⁴ On a free vote, the Bill passed by 20 votes to 13.¹²⁵

So passed, the *Crimes (Capital Offences) Act 1975* (Vic) amended the *Crimes Act 1958* (Vic) to insert a new s 3, which stated: ‘Notwithstanding any rule of law to the contrary whosoever is convicted of treason or murder shall be liable to imprisonment for the term of his natural life.’¹²⁶ It also removed references to the death penalty throughout the *Crimes Act*.¹²⁷

¹¹⁷ Australian Coalition Against Death Penalty, ‘Interview with Dr Philip Opas QC, 1 March 2004’ (online) <<http://www.acadp.com/>>.

¹¹⁸ Jones, above n 17, 263–71; see further Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford, 2001), 657–8.

¹¹⁹ This proportion of Labor members in the Council was related in subsequent parliamentary debate on the question in South Australia: South Australia, *Hansard*, Legislative Council, 1 December 1976, 2680 (J E Dunford).

¹²⁰ Victoria, *Hansard*, Legislative Assembly, 4 March 1975, 3799–800.

¹²¹ *Ibid* 3819 (Rupert Hamer).

¹²² *Ibid* 3820.

¹²³ *Ibid* 8 April 1975, 4710.

¹²⁴ *Ibid* 15 April 1975, 4885.

¹²⁵ *Ibid* 23 April 1975, 5275.

¹²⁶ Section 2 (Punishments for treason and felony).

¹²⁷ Section 3 (Consequential amendments).

South Australia

In South Australia, despite continued interest in abolition and parliamentary questions about such reform, the *Criminal Law Consolidation Act 1935* (SA) duplicated the two existing capital offences already on the law books: murder (s 11) and ‘piracy and attempt to murder’ (s 207).¹²⁸ The Act also retained the section allowing for the public execution of Aboriginal offenders, even though the provision had fallen into disuse since the 1860s.¹²⁹

In practice, many — but by no means all — offenders had their death sentences commuted. According to A R G Griffiths, between 1836 and 1964, 108 capital offenders had their death sentences commuted, while 76 were executed.¹³⁰ After 1852, most of those whose sentences were commuted received life imprisonment and were eventually released.¹³¹ As Barry Jones has written, the death penalty gave rise to a less distinct party divide in South Australia than in other states, which meant that the commutation of executions did not neatly align with any one party’s control of cabinet.¹³² During the 20th century (from 1901 to abolition), 19 people were executed, with the last execution taking place in 1964.¹³³

In 1965 a Labor Government was returned, but an attempt by Premier Don Dunstan to abolish hanging was defeated in the upper house in 1971.¹³⁴ In 1972, the provision permitting the public execution of Aboriginal persons was at last repealed.¹³⁵ As the Bill’s proponent in the Legislative Council, A J Shard, said on its second reading: ‘I think it is patently obvious why this antiquated provision must be removed.’¹³⁶ But the death penalty itself would not be abolished altogether for another five years. In 1975, the incumbent Labor government won the State election and also gained more seats in the upper house. This increased Labor’s

¹²⁸ In June 1930, for example, *The Advertiser* reported on discussions about abolition in the Legislative Assembly: ‘There is no intention to introduce a Bill to abolish the death penalty, said the Premier (Hon L L Hill), replying to Mr. Hopkins in the Assembly yesterday.’ *The Advertiser* (Adelaide), 18 June 1930, 16.

¹²⁹ Section 307. McGuire, above n 43, 201.

¹³⁰ A R G Griffiths, ‘Capital Punishment in South Australia, 1836–1964’ (1970) 3 *Australian and New Zealand Journal of Criminology* 214, 214, 216.

¹³¹ *Ibid* 218, 221.

¹³² Jones, above n 17, 272.

¹³³ *Ibid* 257.

¹³⁴ Specifically, in 1971 the Legislative Council rejected the Capital and Corporal Punishment Abolition Bill, which had been passed by the Legislative Assembly. First and second reading: South Australia, *Hansard*, Legislative Council, 4 December 1970, 3437–40 (A J Shard). Debate: *ibid*, 23 February 1971, 3482–6 (H V Springett speaking against the Bill); 24 February 1971, 3518–22 (F J Potter, speaking for it); 25 February 1971, 3592–3 (G J Gilligan, speaking against); 2 March 1971, 3636–8 (Arthur Rymill, undecided); 3 March 1971, 3717–18 (CM Hill, speaking against); 9 March 1971, 3813–16 (Jessie Cooper, speaking against); 11 March 1971, 3983–4 (in committee); 30 March 1971, 4439 (in committee). The vote on the Bill’s key clause divided the Council 5 ‘ayes’ to 14 ‘noes’: *ibid* 30 March 1971, 4439. In his comments, Sir Arthur Rymill also referred to a similar Bill of 1965, which ‘for some reason ... never reached the Council’: *ibid* 2 March 1971, 3636.

¹³⁵ *Criminal Law Consolidation Act Amendment Act 1971* (SA) s 4. The Act also obviated the need for judges, when imposing sentences of ‘death’, to pronounce such sentences aloud (s 3) and put beyond doubt the Governor’s power to commute such sentences (s 2). The Act received assent on 29 February 1972.

¹³⁶ South Australia, *Hansard*, Legislative Council, 17 November 1971, 3116 (A J Shard). See also at 3262 (Arthur Rymill).

ability to push more ambitious reforms, and in 1976 the Parliament passed the *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA). The Act was substantially the same as the defeated bill of 1970–71.¹³⁷ In the House of Assembly, the Attorney General Peter Duncan said:

As a member of the Australian Labor Party, as Attorney General, and, perhaps most importantly, as a member of society, I favour the abolition of the death penalty without reservation. I recognise however that there are members of society and of this House who have equally strong views in favour of its retention. I recognise also that it is quite possible for retentionists to be both intelligent and honest, and I respect their right to hold their views ... I shall be content if I can demonstrate to them that they may be wrong.¹³⁸

The Attorney General concluded his speech by saying that '[t]he official buck-passing from the jury, judge, Cabinet, Governor, and hangman must stop at this Parliament.'¹³⁹ On 23 November 1976, the House of Assembly passed the Bill by 28 votes to 16.¹⁴⁰ But on 9 December, the Legislative Council returned the Bill with an amendment that would have retained the death penalty for murder in specified circumstances, including where the victim was a police officer, or for a sexual murder of a child, or 'where the murder was committed ... to terrorize the people of any country or state, or of any national, ethnic or religious group'.¹⁴¹ The same day, the Attorney General moved, with success, that the House disagree with the amendment because it 'destroys the main purpose of the Bill'.¹⁴² The Legislative Council did not press its amendment, and the bill received assent on 29 March 1977.¹⁴³

Section 4 amended '*The Criminal Law Consolidation Act 1935-1975*' by inserting a new s 5a(1) that stated that '[n]otwithstanding any provision of any Act or law, no sentence of death shall be—(a) imposed upon, or recorded against, any person; or (b) carried into execution upon any person.' Section 5a(2) stated that a person liable under any Act or law to the death sentence was instead to be sentenced to 'imprisonment for life'. A new s 10a made the same substitution specifically for treason.¹⁴⁴ The existing provisions regarding murder (s 11) and piracy and attempt to murder (s 207) were amended to replace the death penalty with life imprisonment.¹⁴⁵

¹³⁷ South Australia, *Hansard*, House of Assembly, 5 August 1976, 459 (Peter Duncan).

¹³⁸ *Ibid.* In the Legislative Council, no fresh second reading speech was made; instead, the Attorney General's speech would be inserted into the record again: South Australia, *Hansard*, Legislative Council, 24 November 1976, 2435 (T M Casey).

¹³⁹ South Australia, *Hansard*, House of Assembly, 5 August 1976, 461 (Peter Duncan).

¹⁴⁰ *Ibid.* 23 November 1976, 2383.

¹⁴¹ South Australia, *Hansard*, Legislative Council, 8 December 1976, 2889–92; South Australia, *Hansard*, House of Assembly, 9 December 1976, 2936. The amendment was moved by J C Burdett, who cited reasons of deterrence. It split the Council nine votes to nine. The Chairman gave it his deciding vote, but only to enable the House of Assembly to consider it. The Bill, so amended, passed.

¹⁴² South Australia, *Hansard*, House of Assembly, 9 December 1976, 2936–8 (Peter Duncan).

¹⁴³ The motion that the Council 'do not insist on its amendment' succeeded on 9 December 1976, 12 votes to six: South Australia, *Hansard*, Legislative Council, 9 December 1976, 2923–4. Assent to the Bill is recorded in South Australia, *Hansard*, House of Assembly, 29 March 1977, 2950.

¹⁴⁴ Inserted by *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA) s 5.

¹⁴⁵ *Ibid.* ss 6 and 7 respectively.

The Australian Capital Territory

After the Commonwealth's acquisition of the Australian Capital Territory from New South Wales in 1911, the *Crimes Act 1900* (NSW) and the *Piracy Punishment Act 1902* (NSW) were applied in the new jurisdiction.¹⁴⁶ Under s 19 of the former, murder was punishable either by death or penal servitude for life. Under s 4 of the latter, piracy accompanied by assault with intent to murder was punishable by death. Yet the Australian Capital Territory is unique in being the only Australian state or territory never to have carried out an execution: all death sentences imposed in the Territory were commuted. Formal abolition, however, only came in 1983, with the *Crimes (Amendment) Ordinance 1983* (Cth). By ss 7 and 8, the Ordinance substituted the penalty for murder with 'imprisonment for life'.¹⁴⁷

Western Australia

Western Australia had what Barry Jones described as 'an unbeatable record' in executions — some 26 — since 1901.¹⁴⁸ The Labor Party in the State also appears to have 'been converted to abolition much later than in the eastern states'.¹⁴⁹ The last executions in Western Australia took place in 1964.¹⁵⁰

In the State's *Criminal Code* of 1902, the capital crimes were: treason (s 37); piracy with assault, wounding or endangering of life (s 78), attempted piracy with assault, wounding or endangering of life (s 79), wilful murder and murder (s 280).¹⁵¹ The Code retained a section (s 663) providing for public execution of Aboriginal offenders. This provision, as well as each of the capital offences, continued unchanged in the *Criminal Code Compilation Act 1913* (WA).¹⁵² Then, with amendments made in 1961, the death penalty for 'murder' was abolished in favour of life imprisonment, although convictions for 'wilful murder' continued to draw the penalty.¹⁵³ When the conservative Government sought to modify some aspects of criminal punishments in 1965, there were protests from Labor members that it did not end the death penalty.¹⁵⁴ Abolition came at last in 1984, after Labor had ousted

¹⁴⁶ This statute applied in the Territory from the date of its acquisition by the Commonwealth, 1 January 1911.

¹⁴⁷ See also Explanatory Statement, Australian Capital Territory Ordinance No 27, 1983, Crimes (Amendment) Ordinance 1983, authorised by the Attorney-General. With the establishment of self-government in 1989, this ordinance became an ACT Act: *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 34 (4).

¹⁴⁸ Jones, above n 17, 273–4.

¹⁴⁹ *Ibid.*

¹⁵⁰ Eric Edgar Cooke and Brian Robinson: Jones, above n 17, 274. Jones also notes that in 1965 a 16-year-old male was sentenced to death; presumably his sentence was commuted.

¹⁵¹ *Criminal Code Act 1902* (WA).

¹⁵² Section 280 (punishment of murder) became s 282; s 663 (execution of sentence of death) became s 678.

¹⁵³ *Criminal Code Amendment Act 1961* (WA), s 3. See Western Australia, *Hansard*, Legislative Assembly, 14 September 1961, 937–8 (Herbert Graham, giving second reading to Criminal Code Amendment Bill); Legislative Council, 12 October 1961, 1590 (A F Griffith, doing likewise).

¹⁵⁴ The reforms followed the recommendations of a committee of legal experts, who, according to Jones, above n 17, 274, had recommended abolition, but discussion in the House suggests they did not go that far. See Western Australia, *Hansard*, Legislative Council, 16 November 1965, 2418 (F J S Wise); Legislative Assembly, 17 November 1965, 2517–19 (Charles Court).

the three-term Liberal-National Country coalition government. Moving the Bill, Premier Brian Burke pointed to the British Parliament's rejection the year before of a proposal to reintroduce hanging, saying:

Given the example of that vote, in the light of the IRA crisis and other acts of terrorism that have beset Britain in recent years, how can we, here in Western Australia, vote for a retention of the barbarism that has been rejected so decisively in less happy lands?¹⁵⁵

The Bill passed the Legislative Assembly 24 votes to 20, and the Legislative Council 17 to 12.¹⁵⁶ So passed, the *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA) amended the Criminal Code, removing the punishment of 'death' from all formerly capital crimes therein.¹⁵⁷ Section 678, providing for the public execution of Aboriginal capital offenders, was likewise at last repealed.¹⁵⁸

New South Wales

The *Crimes Act 1901* (NSW) reproduced the nine capital offences that had existed under colonial law, and continued to recognise the Imperial law on treason.¹⁵⁹ The Imperial capital offence of arson in royal dockyards likewise continued to apply.¹⁶⁰ Additionally, s 4 of the *Piracy Punishment Act 1902* (NSW) made piracy accompanied by assault with intent to murder a capital crime, bringing the total of capital crimes to 10. The 1920s and 1930s saw early attempts to abolish the death penalty. In 1925, for example, Labor Attorney General (and later High Court Justice) Edward McTiernan introduced an abolition bill.¹⁶¹ These attempts did not succeed, and the penalty remained on the statute book. As Barry Jones has noted, however, all death sentences under New South Wales Labor Governments were commuted, consistently with the Party's longstanding abolitionist platform.¹⁶² The last execution in New South Wales was in 1940.¹⁶³

¹⁵⁵ Western Australia, *Hansard*, Legislative Assembly, 22 March 1984, 6475–7 (Brian Burke, giving the second reading).

¹⁵⁶ Western Australia, *Hansard*, Legislative Assembly, 14 August 1984, 696; Legislative Council, 22 August 1984, 1073.

¹⁵⁷ Treason, by s 9; piracy with assault, wounding or endangering of life, by s 12; attempted piracy with assault, wounding or endangering of life, by s 13; and murder, by s 20.

¹⁵⁸ Section 26.

¹⁵⁹ Murder (s 19), attempted murder by poisoning or wounding (s 27), acts done to property with like intent (s 28), rape (s 63), carnally knowing a girl under ten years (s 67), breaking, entering and assaulting with intent to murder (s 110), setting fire to a dwelling knowing a person to be therein (s 196), setting fire to vessels, any person being therein (s 235), exhibiting a false light or signal with intent to endanger a vessel (s 240). As to the recognition of Imperial law on treason, see s 11.

¹⁶⁰ See Parliament of New South Wales, *Report of the Law Reform Commission on the application of Imperial Acts* (VCN Blight, Government Printer, 1967) <[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/R_4.pdf/\\$file/R_4.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/R_4.pdf/$file/R_4.pdf)> 19.

¹⁶¹ NSW, *Hansard*, Legislative Assembly, 2 September 1925, 528–35 (Edward McTiernan, second reading); Legislative Council, 17 September 1925, 841–6 (A C Willis, second reading). Reported 'Commonwealth and New Zealand News.' *Western Mail* (Perth), 23 July 1925, 19. As to a 1931 bill, see 'Law Reform Bill' *The Sydney Morning Herald* (Sydney), 7 May 1931, 6; 'Proposal to Abolish Capital Punishment' *Barrier Miner* (Broken Hill), 22 May 1931, 4.

¹⁶² Jones, above n 17, 256.

¹⁶³ *Ibid* 257.

During the 1940s the Labor Government did not push for abolition.¹⁶⁴ It was not until 1955, after Labor won control of both houses of the State Parliament, that Attorney General W R Sheahan QC moved a bill that, he said, ‘will abolish capital punishment in New South Wales’.¹⁶⁵ In fact, as J J Maloney noted in moving the bill in the upper house, it would retain the penalty for the crimes of treason and piracy.¹⁶⁶ With the *Crimes (Amendment) Act 1955* (NSW), the State thus abolished the death penalty for ordinary crimes.¹⁶⁷ Yet treason, arson in naval dockyards and piracy with assault with intent to murder remained capital offences.¹⁶⁸

The death penalty for these remaining crimes was not abolished until 1985, making New South Wales the last Australian state or territory to abolish the penalty. In moving the 1985 legislation, the Attorney General W R Sheahan conveyed the impression that, strictly speaking, the State’s law had not contained any capital offences since 1973:

When I announced the Government’s intention to abolish the death penalty completely, it was arguable that there remained three types of offences for which the death penalty could be imposed in this State. These included particular forms of treason and piracy, and a third category relating to the arson of Royal dockyards. All these offences existed as a result of the supposed application of British Imperial legislation to this State [although] it now seems that the Commonwealth has effected the repeal of the death penalty for all Imperial offences applying to this State by the Death Penalty Abolition Act, 1973.¹⁶⁹

This was the effect of a case decided by the High Court earlier in 1985, *Kirmani v Captain Cook Cruises Pty Ltd (No 2)*.¹⁷⁰ As the Attorney General added:

These bills will make a clear and unambiguous statement to those who are not versed in the finer points of constitutional law, that the death penalty is totally repealed in New South Wales.¹⁷¹

But the Attorney General was not entirely correct in suggesting that the State had had no capital crimes since 1973. As stated above, the capital offence of piracy with assault with intent to murder was created by State rather than Imperial law. Under the *Piracy Punishment Act 1902* (NSW) s 4, the death penalty remained applied until 1985. As such, the 1985 reforms were by no means solely formal or clarificatory.

¹⁶⁴ ‘Labour will not repeal death sentence,’ *The Canberra Times* (Canberra), 20 January 1947, 3.

¹⁶⁵ NSW, *Hansard*, Legislative Assembly, 23 March 1955, 3223–60.

¹⁶⁶ NSW, *Hansard*, Legislative Council, 29 March 1955, 3312.

¹⁶⁷ Section 5 amended the *Crimes Act 1900* (NSW) by removing the death sentence from ss 19 (murder), 27 (attempted murder), 28 (acts done to property with like intent), 63 (rape), 67 (carnally knowing a girl under the age of ten), 110 (breaking, entering and assaulting with intent to murder), 196 (setting fire to a dwelling knowing a person to be inside), 235 (setting fire to a vessel with any person aboard), 240 (exhibiting false signals). It also made consequential amendments.

¹⁶⁸ The relevant Imperial Acts were continued by the *Imperial Acts Application Act 1969* (NSW) s 6, sch 2 pt 2 (treason), sch 3 (arson in royal dockyards).

¹⁶⁹ New South Wales, *Hansard*, Legislative Assembly, 10 April 1985, 5684.

¹⁷⁰ (1985) 159 CLR 461.

¹⁷¹ *Ibid.*

In any event, the Opposition supported the Government's two bills in both houses.¹⁷² So passed, the *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW), s 2 and Sched 1, amended the *Crimes Act 1900* (NSW) to remove all references to the death penalty and affirm, by a new s 431, that '[a] person is not liable to the punishment of death' for any offence under an Act or an Imperial Act applicable in New South Wales. The *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW) removed references to the death penalty from other statutes, including the *Piracy Punishment Act 1902*.¹⁷³

IV Abolition of the Death Penalty by the Commonwealth

The Commonwealth has never executed a person for their crimes. The sole capital crime created by federal law created was treason, which existed in s 24 of the *Crimes Act 1914* (Cth). In addition, Commonwealth legislation applied capital offences created by Imperial military law to persons on active service in the Australian defence forces.¹⁷⁴

At least in the early decades after Federation, Australia was not alone in adopting capital offences created by Imperial military law: all colonial or dominion soldiers who fought with Britain in World War I were subject to the *Army Act 1881* (Imp), under which desertion, for example, was punishable by death. There are reports of Canadian soldiers being punished in such a way.¹⁷⁵ Remarkably, however, Australia appealed to the Imperial authorities and succeeded in extracting an assurance that the death penalty would not be imposed on Australian soldiers.¹⁷⁶ Nonetheless, Commonwealth military law continued to adopt and apply capital offences of Imperial military law to serving Australian forces until 1973, when abolition legislation was passed.¹⁷⁷

In the federal Parliament, as elsewhere, abolition took numerous attempts. In 1960 and 1963, abolitionist amendments to crimes bills were moved but defeated, and in 1968 and 1972 abolitionist bills that passed the Senate languished in the lower house, stymied by the government of the day.¹⁷⁸ On 28 August 1973,

¹⁷² See New South Wales, *Hansard*, Legislative Council, 17 April 1985, 6180 (B J Unsworth).

¹⁷³ By ss 4 and 6, substituting the death penalty with penal servitude for life.

¹⁷⁴ *Defence Act 1903* (Cth) ss 55 and 56, applying the provisions of the *Army Act 1881*, 44 & 45 Vict. c.58 and the *Naval Discipline Act 1886*, 29 & 30 Vict., c.109 respectively to the military and naval forces of the Commonwealth while on active service. As to subsequent British army, naval and airforce disciplinary statutes that had Australian application, see *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 542 [20] (Mason CJ, Wilson and Dawson JJ), 561–2 [18] (Brennan and Toohey JJ).

¹⁷⁵ Commonwealth, *Hansard*, House of Representatives, 26 September 1918, 6429–30 (William Watt).

¹⁷⁶ *Ibid.* It also appears that the Australian laws were more narrowly framed than some others, so that the capital offence was limited to desertion to the enemy and did not apply to the more usual type of desertion.

¹⁷⁷ In December 1971, these capital offences were listed in a report by the Senate Standing Committee on Constitutional and Legal Affairs. By the *Naval Defence Act 1910* (Cth) s 34, the British *Naval Discipline Act 1957* applied to the Royal Australian Navy, including such capital offences as aiding the enemy, treason and murder. By the *Defence Act 1903* (Cth) ss 54, 55 the British *Army Act 1955* applied to members of the military forces serving overseas and at all times during war, including such capital offences as treachery and mutiny. By the *Air Force Act 1923* (Cth), s 8 the *Air Force Act 1939* applied to the Royal Australian Air Force, including such capital offences as treachery and mutiny.

¹⁷⁸ See Commonwealth, *Hansard*, House of Representatives, 29 August 1973, 522–3 (Gough Whitlam).

with Gough Whitlam's Labor Government in power, another abolition bill passed the Senate. The same day, it was moved in the House of Representatives by the Prime Minister himself.¹⁷⁹ Opponents of outright abolition moved numerous exceptions that were designed to retain the death penalty for various circumstances, but all such attempts were defeated. The Bill passed the House of Representatives on 13 September 1973, by 73 'ayes' to 27 'noes'.¹⁸⁰ The no vote was predominantly made up of Members belonging to the National Party, which, as David Marr has written, 'opposed the [Bill] almost to a man — along with Billy Wentworth and Malcolm Fraser'.¹⁸¹

The *Death Penalty Abolition Act 1973* (Cth) came into force five days later on 18 September 1973. It provided that, by s 4, 'A person is not liable to the punishment of death for any offence.' By s 5, where any law to which the Act applies provides that a person is liable to the punishment of death, 'the reference to the punishment of death shall be read, construed and applied as if the penalty of imprisonment for life were substituted for that punishment.'

Almost two decades later, on 2 October 1990, Australia became a party to the Second Protocol to the International Covenant on Civil and Political Rights, art 1(2) of which requires that: 'Each State Party shall take all necessary steps to abolish the death penalty within its jurisdiction.'¹⁸² There were calls from commentators for Australia to take the further step of legislating to ensure that the death penalty could not be reintroduced in the states or territories, thereby giving full effect to the nation's obligations under the Protocol.¹⁸³ It was pointed out that Parliament could do this by relying on its power under the Constitution to make laws with respect to 'external affairs' (s 51(xxix)) — a power that, as the High Court has held in decisions such as the 1983 *Tasmanian Dams* case,¹⁸⁴ extends to the making of laws to implement obligations assumed by Australia under international treaties and conventions.

Australia's most recent abolitionist legislation proceeded on this basis, with the introduction of the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009. In the Second Reading speech in the House of Representatives on 19 November 2009, Attorney-General Robert McClelland said that:

The overarching purpose behind these amendments is, in the spirit of engagement with international human rights mechanisms, to ensure that Australia complies fully with its international obligations to ... demonstrate our commitment to the worldwide movement to abolish capital punishment.¹⁸⁵

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 13 September 1973, 989.

¹⁸¹ Marr, above n 4.

¹⁸² See above n 3.

¹⁸³ See, eg, Byrnes, above n 2, 37; Walton, above n 11; George Williams, 'Mess of contradiction' *Canberra Times*, 22 November 2008; cf Garkawe, above n 11.

¹⁸⁴ *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹⁸⁵ Commonwealth of Australia, *Hansard*, House of Representatives, 19 November 2009, 12197. Speeches in support were also given by Members Melissa Parke, Luke Simpkins, Tony Zappia, Rob Oakeshott, Janelle Saffin, Graham Perrett, Shanye Neumann, Steve Georganas, Maria Vamvakinou, Mike Kelly, Mark Dreyfus, John Murphy, Jill Hall, Peter Slipper, Kerry Rea and Laurie Ferguson: 1279–1301 and 1331–55. In the Senate, Penny Wong moved the Bill's second

The Explanatory Memorandum also emphasised the message that the enactment would send:

The purpose ... is to extend the application of the current prohibition on the death penalty to State laws (in addition to Commonwealth, Territory and Imperial criminal laws to which the *Death Penalty Abolition Act* already applies). This will ensure the death penalty cannot be reintroduced anywhere in Australia. It will thereby safeguard Australia's ongoing compliance with the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty ... Such a comprehensive rejection of capital punishment will also demonstrate Australia's commitment to the worldwide abolitionist movement, and complement Australia's international lobbying efforts against the death penalty.¹⁸⁶

The Opposition supported the legislation in both Houses, and there were no speeches or votes against the Bill. So passed, the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) came into force on 14 April 2010. It extended (by virtue of the pre-eminence given to federal laws by s 109 of the Constitution) the Commonwealth prohibition on the death penalty under the *Death Penalty Abolition Act 1973* (Cth) to state and territory laws. Specifically, it inserted a new s 6 in the *Criminal Code Act 1995* (Cth)¹⁸⁷ stating that: 'The punishment of death must not be imposed as the penalty for any offence referred to in subsection 3(2) or (3)' — that is, offences under the laws of the Commonwealth, the territories, the states and, to the extent to which the powers of the Parliament permit, Imperial Acts.

V The Death Penalty and Contemporary Australian Law and Practice

In blocking any state or territory attempt to bring back capital punishment, the 2010 Act is a clear statement that Australia renounces the death penalty now and into the future. Even so, as an ordinary statute the 2010 Act cannot prevent the Commonwealth itself from reintroducing the penalty. The principles of parliamentary sovereignty mean that a future federal law can override this Act.¹⁸⁸ It is also possible that a future federal Act could repeal the 2010 Act so as to enable a state or territory to reintroduce the penalty.

The only means of providing more secure protection against the reintroduction of the death penalty domestically is to amend the Australian Constitution to prohibit any Australian jurisdiction from applying the sanction. Such an amendment would need to be made under s 128 of the Constitution, and would require both the passage of the change by the Federal Parliament and its

reading: Commonwealth of Australia, *Hansard*, Senate, 24 February 2010, 1079–83. George Brandis, Gary Humphries and Kim Carr also spoke in support: Commonwealth of Australia, *Hansard*, Senate, 11 March 2010, 1640–3.

¹⁸⁶ Explanatory Memorandum, Crimes Legislation Amendment (Torture Prohibition And Death Penalty Abolition) Bill 2009 (Cth).

¹⁸⁷ By s 3 and sch 2, 'Amendments relating to the abolition of the death penalty'.

¹⁸⁸ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 357 (Brennan CJ and McHugh J).

approval at a referendum of the Australian people.¹⁸⁹ An example of this is the constitutional ban on the death penalty in the Republic of Ireland, which was approved by electors in 2001 and introduced by the Twenty-first Amendment of the Constitution of Ireland. Article 15.5.2 states: ‘The Oireachtas [parliament] shall not enact any law providing for the imposition of the death penalty.’¹⁹⁰

The 2010 Act has a clear operation with respect to the imposition of the death penalty by Australian law. It does not, however, mark the final opportunity for legislating in Australia to eradicate the penalty. In particular, the 2010 Act does nothing to prevent Australian authorities from participating in processes leading to death sentences abroad through extradition, mutual assistance in criminal proceedings and agency-to-agency (especially police) assistance. These areas have drawn attention and criticism in the last decade, particularly in the wake of the involvement of the Australian Federal Police in the case of the so-called ‘Bali Nine’.¹⁹¹ Disagreement remains on whether Australia’s practices in these areas fulfil the nation’s international law obligations.¹⁹²

Extradition and Waiver of Extradition

Australian law prevents the extradition of a person to a foreign country in circumstances where he or she may face execution, unless an acceptable undertaking is given that the death penalty will not be carried out. Under ss 22(3)(c) and 25(2)(b) of the *Extradition Act 1988* (Cth) the Federal Attorney-General may authorise the extradition of an individual for a capital offence if the extradition country undertakes that:

- (i) the person will not be tried for the offence; or
- (ii) if the person is to be tried for the offence, the death penalty will not be imposed on the person; or
- (iii) if the death penalty is imposed on the person, it will not be carried out.

¹⁸⁹ This would by no means be easy; only eight out of 44 such referendums have passed in Australia’s history. See ‘Appendix 2: Referendum proposals’ in George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, (University of New South Wales, 2010) 267.

¹⁹⁰ *Twenty-first Amendment of the Constitution Act, 2001* (Ireland), s 1 and sch 1, pt 2.

¹⁹¹ Eg Michael Walton, ‘The Death Penalty in Australia and Overseas’ (2005) NSW Council for Civil Liberties Background Paper 2005/3, 29 March 2005; Nadia Harrison, ‘Extradition of the “Bali Nine”’: Can and should the risk of capital punishment facing Australians be relevant to extradition decisions?’ (2006) 1(4) *International Journal of Punishment and Sentencing* 221; Byrnes, above n 2, 37; Ronli Sifris, ‘Balancing Abolitionism and Cooperation on the World’s Scale: The Case of the Bali Nine’, (2007) 35 *Federal Law Review* 81; Michael Walton, ‘Law Reform and the Death Penalty: Consolidating Australia’s Commitment to the Abolition of Capital Punishment’, NSW Council for Civil Liberties, 4 February 2008; Lorraine Finlay, ‘Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia’, (2011) 33 *Sydney Law Review* 95.

¹⁹² See, eg, *Judge v Canada*, UN Human Rights Committee, Communication No. 829/1998, 49th sess, UN Doc CCPR/C/78/D/829/1998 (2003) [10.3] and especially UN Human Rights Committee, ‘Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, CCPR/C/AUS/CO/5, 2 April 2009 [20]. Cf Finlay, above n 191, 107–10.

The question of whether the undertaking can be relied upon is for the Attorney-General to decide. The statute does not require that the undertaking be enforceable. However, as the full Federal Court has stated, the Attorney-General should 'consider whether the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the penalty of death would not be carried out'.¹⁹³ This observation was made in the case of British expatriate Michael McCrea, who was to be extradited from Australia to Singapore to be tried for the murder of his driver and his driver's girlfriend. After the full Federal Court affirmed the validity of McCrea's surrender warrant, he was extradited to Singapore, tried for the non-capital offence of manslaughter and on 29 June 2006 sentenced to 24 years' imprisonment.

Section 18 of the *Extradition Act* permits a person to consent to his or her surrender, in which case the above safeguards do not apply. Concerns about consent requirements and undertakings arose from the recent high-profile case of Gabe Watson, an Alabama man who was convicted of manslaughter by a Queensland court after his wife died during a 2003 scuba diving trip on the Great Barrier Reef. In September 2010, the Queensland Government sought and obtained an undertaking from the State of Alabama that it would not pursue the death penalty in any possible criminal action against Gabe Watson. Alabama provided an undertaking, albeit in wording which drew speculation that it was intended to leave the door open to the bringing of federal capital charges, as distinct from state charges.¹⁹⁴ As one report suggested, there was also 'pessimism' within the Australian Government about the undertaking.¹⁹⁵ Whether to remove the need for any additional undertaking from the US government, or because Watson had expressed a desire to return voluntarily to Alabama, immigration officials asked Watson to sign a document consenting to his removal, notwithstanding the risk that he might face the death penalty.¹⁹⁶ Watson refused. The Australian Government then delayed his deportation until it had obtained additional assurances from the US Government, and Watson was deported on 25 November 2010.¹⁹⁷ On 23

¹⁹³ *McCrea v Minister for Justice and Customs* (2005) 145 FCR 269, 275. See also *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297 (North J).

¹⁹⁴ 'Police to Hand over Honeymoon Killer Gabe Watson Dossier', *News.com.au* (online), 7 September 2010 <<http://www.news.com.au/breaking-news/police-to-hand-over-honeymoon-killer-gabe-watson-dossier/story-e6frfku0-1225915148119>>.

¹⁹⁵ Hedley Thomas, 'Gabe Watson told: Sign "Death Warrant"', *The Australian* (online), 10 November 2011 <<http://www.theaustralian.com.au/national-affairs/exclusive-watson-told-sign-death-warrant/story-fn59niix-12259151440987>>. An immigration official, director of returns and removals Deirdre Russack, reportedly advised Watson's solicitor that the department wanted to keep the fact of McClelland's 'pessimism as to the legality and validity of (Alabama's) undertaking confidential due to the potential implications to international diplomacy'.

¹⁹⁶ *Ibid.* When questioned about this approach, the Immigration Minister Chris Bowen said: '[M]y understanding is [Watson] had indicated to the department that he was interested in returning voluntarily to the United States. The department did the right thing and provided him with a document to put that in writing, and made sure as part of that process that he was aware of any risk that might go with capital punishment. So they asked him to assure the department that he was fully aware of the risks; that is appropriate.' *Doorstop Interview, Sydney*, (11 November 2010) Chris Bowen MP <http://www.minister.immi.gov.au/media/speeches/2010/cb_doorstop_1004.htm>.

¹⁹⁷ 'Killer Gabe Watson Heads Home after Officials Promise Not to Seek the Death Penalty,' *The Daily Mail* (online), 18 November 2010 <<http://www.dailymail.co.uk/news/article-1330908/Killer-Gabe-Watson-heads-home-officials-promise-seek-death-penalty.html>>; Marissa Calligeros,

February 2012, during Watson's murder trial in Alabama, the judge acquitted the defendant without hearing the defence case and before jury deliberations, remarking that the State's evidence was 'sorely lacking'.¹⁹⁸

The federal Parliament has recently made changes to extradition law, albeit ones that do not change the essential tenets just outlined. Following a 2006 review, the Australian Government released an exposure draft of reforms to extradition and mutual assistance legislation.¹⁹⁹ In 2011, the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 was introduced into the House of Representatives, and the Standing Committee on Social Policy and Legal Affairs sought comments on the reforms. In September 2011, the Committee recommended that the Bill be passed,²⁰⁰ which then occurred in February 2012. The changes are 'designed to reduce delays in current processes [and] ensure Australia does not become a safe haven for fugitives and the proceeds of crime'.²⁰¹ In particular, new ss 15A and 15B clarify the process for persons who wish to consent to surrender to a requesting country; that is, waive extradition. In a proviso that seems aimed at a Gabe Watson-type scenario, the Attorney-General must be satisfied that there is 'no real risk' that the death penalty would be carried out upon the person.²⁰²

During the inquiry, there were calls from the Australian Human Rights Commission, the Human Rights Law Resource Centre and the Australian Lawyers Alliance for the removal of the Attorney-General's 'residual discretion' to extradite persons when the death penalty may be imposed.²⁰³ By 'residual discretion', the submitters were referring to the potential for the Attorney-General to allow extradition upon receiving an undertaking that may subsequently be breached. They echoed a recommendation to the same effect by the UN Human Rights Committee in 2009.²⁰⁴ The Committee noted these concerns, but pointed to evidence from the Attorney-General's Department that, as far as the Department is

'Honeymoon Killer Gabe Watson Leaves Australia', *The Sydney Morning Herald* (online), 25 November 2010 <<http://www.smh.com.au/national/honeymoon-killer-gabe-watson-leaves-australia-20101125-187sg.html#ixzz1fosnW3a3>>.

¹⁹⁸ 'Gabe Watson Acquitted of Honeymoon Dive Death', *The Sydney Morning Herald* (online), 24 February 2012 <<http://www.smh.com.au/world/gabe-watson-acquitted-of-honeymoon-dive-death-20120224-1trff.html>>.

¹⁹⁹ For the exposure draft of the 2011 Bill, see <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~Explanatory+Document+-+Extradition+and+Mutual+Assistance+in+Criminal+Matters+Legislation+Amendment+Bill+2011.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~Explanatory+Document+-+Extradition+and+Mutual+Assistance+in+Criminal+Matters+Legislation+Amendment+Bill+2011.pdf/$file/Explanatory+Document+-+Extradition+and+Mutual+Assistance+in+Criminal+Matters+Legislation+Amendment+Bill+2011.pdf)>.

²⁰⁰ Standing Committee Advisory Report, House of Representatives Standing Committee Social Policy and Legal Affairs, 'Advisory Report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011', tabled 12 September 2011, 24, Recommendation 1.

²⁰¹ Explanatory document, Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 <<http://www.ag.gov.au/Documents/Explanatory%20Document%20-%20Extradition%20and%20Mutual%20Assistance%20in%20Criminal%20Matters%20Legislation%20Amendment%20Bill%202011.pdf>>.

²⁰² *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth), s 15B(3)(b).

²⁰³ Standing Committee Advisory Report, above n 200, 24.

²⁰⁴ UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties', above n 192, 5 [20].

aware, there have been no breaches of undertakings given to Australia by a foreign country.²⁰⁵ The Committee did not include the change in its recommendations.²⁰⁶

Mutual Assistance in Criminal Matters

Mutual assistance is a formal government-to-government process by which countries assist each other in the investigation and prosecution of criminal activity. It includes, for example, taking evidence, issuing search warrants, seizing relevant items, confiscating property, restraining dealings in property, and facilitating the travel of witnesses or other persons.²⁰⁷ A number of treaties signed by Australia provide for such assistance.²⁰⁸ The provisions that govern mutual assistance in circumstances where execution could eventually result are not as clear-cut as the rules of extradition. The applicable statute is the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (*'Mutual Assistance Act'*). Section 8(1A) applies where a person has been charged with, or convicted of, a capital offence, and states (emphases added):

A request by a foreign country for assistance under this Act *must* be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, *unless* the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

The phrase 'special circumstances' is not defined in the *Mutual Assistance Act*. The Explanatory Memorandum that accompanied the amendment provision in 1996 states that 'special circumstances' could include:

Situations where the assistance being sought relates to exculpatory evidence or information; or, situations where the requesting country has provided an undertaking that the death penalty will not be imposed, or if it is imposed, will not be carried out.²⁰⁹

Section 8(1B) applies where there has as yet been no charge for, or conviction on, a capital offence, and states (emphasis added):

(1B) A request by a foreign country for assistance under this Act *may* be refused if the Attorney-General:

(a) believes that the provision of the assistance may result in the death penalty being imposed on a person; and

²⁰⁵ Standing Committee Advisory Report, above n 200, 24.

²⁰⁶ *Ibid* 24, 42.

²⁰⁷ *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 5.

²⁰⁸ Eg *Treaty Between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters*, Opened for signature 30 April 1997, [1999] ATS 19 (entered into force on 30 September 1999). See list at <<http://www.ag.gov.au/Extraditionandmutualassistance/Relationshipwithothercountries/Documents/bilateral%20treaties%20on%20mutual%20assistance%20in%20criminal%20matters.doc>>.

²⁰⁹ Explanatory Memorandum to the Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996, 15.

(b) after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

Thus, at present, the fact that the granting of a request may result in a person being subject to the death penalty is not a mandatory ground for refusing the request. Even where a person has been charged with, or convicted of, a capital offence, assistance may be provided if undefined ‘special circumstances’ are found to exist. Where there has been no such charge or conviction, the law is less stringent again, conferring a broad discretion on the Attorney-General and requiring him or her to consider ‘the interests of international criminal co-operation’.

Although the Government publishes the number of mutual assistance requests received and met each year, the circumstances of particular instances of assistance are not publicly known since confidentiality rules are strict.²¹⁰ As a Government fact sheet stated:

Under the Mutual Assistance Act it is an offence for a Commonwealth official to disclose the fact that Australia has received a request for mutual assistance, the contents of a request or that a request for assistance was granted or refused, unless they are authorised to disclose such information by the Attorney-General or the Minister.

The Australian Government does not generally disclose information about requests that Australia makes to other countries as they are usually made in the course of an ongoing law enforcement operation. Disclosure of information about a mutual assistance request could jeopardise the investigation, apprehension or prosecution of an alleged offender.²¹¹

There have been calls for the Attorney-General’s discretion in this area to be revoked or modified. For example, the UN Human Rights Committee recommended in 2009 that Australia should ensure ‘it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State, and revoke the residual power of the Attorney-General in this regard’.²¹² The recent Standing Committee review of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 received submissions from the Australian Human Rights Commission, Human Rights Law Centre, Australian Lawyers Alliance and the Law Council of Australia arguing that the Attorney-General’s discretion to grant assistance in ‘special circumstances’ should be removed or limited to the provision of assistance in cases where the assistance is exculpatory in nature.²¹³ The Law Council also called for the repeal of s 8(1B), since arguably it ‘suggests that Australia’s position on the death penalty is equivocal and that sometimes it will be in the “interests of international criminal

²¹⁰ Australian Government Attorney-General’s Department, ‘Annual Report 2010–11’, Appendix 11, 309.

²¹¹ Australian Government Attorney-General’s Department, ‘Fact Sheet — What is Mutual Assistance?’. Created on 7 July 2006 and last modified 22 March 2011, this Fact Sheet was authorised by the Branch Head, Extradition and Mutual Assistance Branch and was available until recently on the Department website.

²¹² UN Human Rights Committee, ‘Consideration of Reports Submitted by States Parties’, above n 192, 5 [20].

²¹³ Standing Committee Advisory Report, above n 200, 35.

cooperation” for Australia to be complicit in the imposition or execution of the death penalty abroad.²¹⁴

The *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth) brought about an important, though limited, change. Section 8(1A) was repealed and replaced with a new provision that applies not only where a person has been charged with or convicted of a capital offence, but also where a person has been ‘arrested or detained on suspicion of having committed’ such an offence. This is important because in some legal systems, including Indonesia’s, a suspect may be formally charged later in the legal process than he or she would be in Australia. However, the 2012 Act did not amend s 8(1B), nor did the Standing Committee recommend any change to that section.

In addition, there is no reform proposed to make more information publicly available as to the circumstances in which Australia is providing mutual assistance. Ongoing investigations need not be compromised by the release of such information: identifying details might be excluded from the information released, or time delays might be imposed, and presumably not all instances of mutual assistance will occur against a context of ongoing investigations.

Agency-to-Agency Assistance

Agency-to-agency assistance encompasses both police-to-police assistance and cooperation between non-police government agencies with their counterparts in other countries.²¹⁵ The area of greatest attention in recent years has been the assistance given by the Australian Federal Police (‘AFP’) to their counterparts abroad. The Australian Federal Police (‘AFP’) are authorised under the *Australian Federal Police Act 1979* (Cth) to provide assistance to their counterparts, and specific treaties signed by Australia envisage that they will do so.²¹⁶ Unlike extradition and mutual assistance, agency-to-agency assistance is regulated not by statute, but by internal guidelines. AFP guidelines have seen a number of changes since their introduction in 1998, most recently in 2009.²¹⁷ The 2011 review of extradition and mutual assistance reforms brought calls for mutual assistance

²¹⁴ Law Council of Australia, ‘Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill’, March 2011, 8 <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=F99E554C-D461-C612-839C-615B4D458048&siteName=lca>.

²¹⁵ Examples include: the Australian Crime Commission pursuant to the *Australian Crime Commission Act 2002* (Cth); the Australian Customs Service pursuant to the *Customs Administration Act 1985* (Cth); the Australian Securities and Investments Commission pursuant to the *Australian Securities and Investments Commission Act 2001* (Cth); the Australian Tax Office pursuant to tax treaties; the Australian Transaction Reports and Analysis Centre pursuant to the *Financial Transactions Reports Act 1988* (Cth); and the Department of Immigration and Citizenship pursuant to legislation and memoranda of understanding.

²¹⁶ Eg *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, opened for signature 13 November 2006, [2008] ATS 3 (entered into force 7 February 2008).

²¹⁷ According to the NSW Council of Civil Liberties, which obtained relevant documents under freedom of information rules, the position prior to 1998 was that such cooperation would not be given absent an assurance that the death penalty would not result. NSW Council for Civil Liberties, ‘Australia and the Death Penalty: A guide to confidential government documents obtained under FOI’, Briefing paper, 4 February 2008, 3 [7] <<http://www.nswccl.org.au/docs/pdf/dpfoi%20guide.pdf>>, citing FOI 68.

legislation to be extended to cover agency-to-agency assistance, but this did not form part of the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act* or the Standing Committee's recommendations.²¹⁸

Over the last decade, police-to-police assistance has increased markedly as part of a policy of 'policing at the source' of transnational crime, especially the trafficking of illicit drugs, terrorism, people smuggling and child sex tourism. Unlike extradition requests and requests for mutual legal assistance, which are formal, confined in nature and relatively few in number, police-to-police cooperation is often informal, ongoing and far more frequent. As Lorraine Finlay states in her detailed discussion of police-to-police cooperation, estimates of pieces of information transmitted by the AFP to their foreign counterparts dwarf the numbers of extradition and mutual assistance requests.²¹⁹ In 2008–09 Australia received 17 new requests for extradition and 205 requests for mutual legal assistance.²²⁰ By contrast, each year the AFP transmits approximately 13,000 pieces of information to overseas law enforcement agencies.²²¹ The issue of police-to-police assistance represents a significant policy challenge for Australia because a number of neighbouring countries impose the death penalty, including Indonesia, Singapore, Malaysia, Vietnam, Japan and China.²²² Australia has entered into memoranda of understanding for police-to-police assistance with all of these countries.²²³ It also has such an agreement with the United States, which likewise imposes capital punishment.

This issue arose in 2002 after the signature in June that year of the Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation.²²⁴ In response to the Bali bombings of 12 October 2002, the AFP assisted the Indonesian National Police ('INP') with its investigations. It was clear that capital offences were involved. Indonesia had very

²¹⁸ Explanatory Memorandum, Extradition And Mutual Assistance In Criminal Matters Legislation Amendment Bill 2011, 1; Standing Committee Advisory Report, above n 200, 35. For example, the Human Rights Law Centre submitted: 'The HRLC considers that urgent legislative measures are required to ensure that government agencies, such as the Australian Federal Police, are bound by the same safeguards which protect human rights as those which bind the Executive.'

²¹⁹ Finlay, above n 191, 115 citing Senate Legal and Constitutional Legislation Committee, *Official Committee Hansard (Supplementary Budget Estimates)*, 31 October 2005, 167.

²²⁰ *Ibid.*

²²¹ Comments made by the AFP Commissioner Mick Keelty to the Senate Legal and Constitutional Committee on 17 February 2006.

²²² In fact, Singapore executes more people per capita than any other nation, while China executes more people overall than any other nation. Keim and Henderson, above n 15, 25.

²²³ These agreements are not publicly available, but their signature is announced by press release. The Indonesian example is discussed in more detail, below.

²²⁴ The text is not publicly available, but was referred to in the Federal Court proceedings discussed at n 2311 below and accompanying text. Despite its title, the Memorandum was between the INP and the AFP and was signed by INP General Da'i Bachtiar and AFP Commissioner Mick Keelty on 13 June 2003: Miriam Gani and Wendy Kukulies-Smith, 'Case and comment' (2006) 30 *Criminal Law Journal* 314. On 23 November 2011, the AFP and INP signed a new memorandum to replace the 2002 instrument: Australian Federal Police, 'AFP and Indonesian National Police sign new agreement to combat transnational crime' (Media release, 23 November 2011) <<http://www.afp.gov.au/media-centre/news/afp/2011/november/AFP-and-Indonesian-National-Police-sign-new-agreement-to-combat-transnational-crime.aspx?source=rss>>.

recently introduced the death penalty for terrorism, and indeed the investigation ultimately led to the execution of three men, Amrozi bin Nurhaysim, Huda bin Abdul Haq and Imam Samudra, in Bali on 9 November 2008.

Under the guidelines then in force, the AFP could, up until such time as charges were laid, respond to requests for assistance ‘irrespective of whether the investigation may later result in charges being laid which may attract the death penalty’.²²⁵ After charges were laid, however, no action was to be taken before ‘consultation’ with the Attorney-General’s Department and the Minister for Justice.²²⁶ Accordingly, in early 2003, when charges were imminent, the AFP sought and obtained the Justice Minister’s approval to continue cooperating with the INP. These deliberations were not made public.²²⁷

The issue attracted public debate in the case of the ‘Bali Nine’: nine Australians who in 2005 were arrested and then convicted in Bali for trafficking heroin, a crime that in Indonesia can attract the death penalty. The arrests were aided by key information volunteered by the AFP to the INP, without any request from the INP. When the Australian public became aware of the AFP’s role and the possible fate of those accused, the AFP came under censure from human rights advocates, including from the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston.²²⁸ Yet, as Finlay has pointed out, the guidelines were silent on the voluntary sharing of information in the absence of any request.²²⁹ And, as is stated above, even if there had been an INP request, the guidelines permitted the AFP to provide assistance without ministerial approval up until the laying of charges — a step that, for the Bali Nine, came six months after their arrest.²³⁰ A 2006 attempt by four of the Bali Nine to challenge the lawfulness of the AFP officers’ conduct failed, foundering at the discovery phase due to the absence of reasonable prospects of success.²³¹ However, in the opening paragraph of his reasons for judgment, Finn J called for a review of AFP procedures and protocols in this area.²³²

In September 2006, the Government released revised guidelines. These guidelines, however, were worded in a way that would not have precluded the criticised conduct.²³³ Then, on 18 December 2009, the Government released

²²⁵ *AFP Practical Guide on International Police to Police Assistance in Death Penalty Situations* (Document Identifier: OG00014, Date Valid: 1998) <<http://www.nswccf.org.au/docs/pdf/afp%20dp%20guidelines.pdf>>.

²²⁶ *Ibid.*

²²⁷ The NSW Council of Civil Liberties later obtained the relevant correspondence under freedom of information rules, including a 20 February 2003 letter from Minister of Justice Chris Ellison to AFP Commissioner Mick Keelty, giving the approval sought on the condition that the Indonesians would prosecute only non-Australian adults arrested outside of Australia. NSW Council for Civil Liberties, above n 217, 7 [31].

²²⁸ See media coverage and other sources cited in Finlay, above n 191, 99.

²²⁹ Finlay, above n 191, 106.

²³⁰ *Ibid.*; *AFP Practical Guide on International Police*, above n 225.

²³¹ *Rush v Commissioner of Police* (2006) 150 FCR 165 (Finn J). See also Gani and Kukulies-Smith, above n 224, 314.

²³² (2006) 150 FCR 165, 165.

²³³ The Guide provided that ‘[p]olice-to-police assistance can be provided, without reference to the Attorney-General or Minister for Home Affairs, until charges are laid for the [capital] offence’ and that after charges have been laid, ‘the Attorney-General or the Minister for Home Affairs may

further revised guidelines.²³⁴ The *AFP Practical Guide on International Police-to-Police Assistance in Potential Death Penalty Situations* ('the Guide') prescribes a list of factors that must be taken into account by senior AFP management when requests for information are received from law enforcement agencies in countries that may apply the death penalty.²³⁵ Under s 8, the factors are:

- (i) the purpose of providing the information;
- (ii) the likelihood of the authorities in the foreign country using the information only for that purpose;
- (iii) the reliability of the information;
- (iv) whether the information is exculpatory in nature;
- (v) the nationalities of the person involved;
- (vi) the person's age and personal circumstances;
- (vii) the seriousness of the suspected criminal activity;
- (viii) the potential risks to the person, and other persons, in not providing the information;
- (ix) the degree of risk to the person in providing the information, including the likelihood the death penalty will be imposed; and
- (x) Australia's interest in promoting and securing cooperation from overseas agencies in combating crime.

The Guide also requires:

- (i) ministerial approval of assistance in any case in which a person has been arrested, detained, charged with, or convicted of an offense that carries the death penalty (s 8); and
- (ii) the AFP Commissioner to report biannually to the Minister for Home Affairs about the number and nature of cases where information is provided to foreign law enforcement agencies in potential death penalty cases (s 9).

In announcing the guidelines, the Attorney-General and the Minister for Home Affairs drew attention to the fact that '[s]uccessive Australian Governments have maintained a long-standing policy of opposition to the death penalty and it is appropriate that this position is reflected in our law enforcement practices.'²³⁶

decide that police-to-police assistance can continue to be provided'. This version of the Guide is no longer available online; see Finlay, above n 191, 107. As Finlay notes, the revisions if anything made the Guide more permissive of cooperation in circumstances where charges have been laid.

²³⁴ Attorney-General Robert McClelland MP and Minister for Home Affairs Brendan O'Connor MP, 'International Law Enforcement Cooperation', Press release, 18 December 2009. This press release was published on the website of the Attorney-General, but is no longer available online.

²³⁵ *AFP Practical Guide on International Police-to-Police Assistance in Potential Death Penalty Situations*, s 8. Issued pursuant to *Australian Federal Police Act 1979* (Cth), ss 37(1), 69C. The Guide was published on the AFP website, but is now available in a cached version only <<http://www.afp.gov.au/about-the-afp/~media/afp/pdf/ips-foi-documents/ips/publication-list/NAT12011%20International%20Police-to-police%20Assistance%20in%20Death%20Penalty%20Situations%2014MAY2012.ashx>>.

²³⁶ Robert McClelland and Brendan O'Connor, above n 234.

However, does the Guide in fact reflect that long-standing opposition? Certainly, it ensures that key decisions will be made at a senior level and puts the bases for those decisions on a more transparent footing. It also corrects the problem whereby an arrest without charge did not trigger the requirement for ministerial approval.²³⁷ There remains doubt, however, as to how the Guide is applied in practice. David Marr, in a 2010 speech marking World Day Against Capital Punishment, observed that the Government had refused to say whether the new Guide would have led the AFP to act any differently in its dealings with the Bali Nine.²³⁸ In particular, the approval procedure for pre-arrest or charge situations continues to apply by its terms only to information that is requested (ss 7 and 8), making no provision for information that is volunteered by the AFP. (By contrast, the s 8 approval procedure for post-arrest or charge situations refers more generally to the ‘exchange of information’.) Much of the information shared by the AFP is shared informally, without the making of any request as such.²³⁹ There is no principled reason for distinguishing between information requested and information volunteered. As the Bali Nine case shows, the Guide’s silence on this point is a critical omission.

The regulation of agency-to-agency assistance is no simple issue. Finlay points to the implications for international police cooperation, the high volume of information flows and the many factors other than assistance given by an Australian agency on which any eventual death sentence is contingent. Writing in the context of the 2006 Guide, prior to the 2009 revisions, Finlay concluded that the rules represented ‘an appropriate and practical balance between competing public policy interests, namely Australia’s opposition to the death penalty and broader law enforcement objectives.’²⁴⁰ While a detailed consideration of the operation of the Guide is beyond our scope, it is clear nonetheless that there is a need to ensure, at the least, that the Guide applies to all information shared, irrespective of whether or not there has first been a request. More broadly, there is a need for close and ongoing scrutiny of practices in this area in order to assess whether further tightening of the Guide or the enactment of legislation is warranted. The AFP Commissioner’s biannual reports under s 9 may provide some of the data needed to make this assessment.

VI Conclusion

The history of legislative reform on capital punishment in Australia bears out the oft-repeated statement that the nation has a longstanding opposition to the penalty. Behind the official abolition dates for the states and territories are often much earlier practices of *de facto* abolition. Yet the history also shows that the penalty’s abolition took, in some jurisdictions at least, many decades to achieve, and that reform did not always go in the one direction. Even today, debate sporadically recurs about whether the penalty should be reinstated. Seen in this light, the 2010

²³⁷ Previously, the trigger for this requirement was the laying of charges, but in the Indonesian criminal justice system this may happen relatively late in proceedings. See Finlay, above n 191, 106.

²³⁸ Marr, above n 4.

²³⁹ See eg Gani and Kukulies-Smith, above n 224, 319, quoting senior AFP officer Michael Phelan.

²⁴⁰ Finlay, above n 191, 96.

Act, which prevents the penalty's reintroduction in any Australian state or territory, is not only a statement of national opposition to capital punishment. It is also a protection of ongoing relevance and importance. The only means of providing more secure protection against the penalty's reintroduction would be to amend the Australian Constitution by way of a referendum.

Australian governments continue to emphasise the nation's opposition to the imposition of the death penalty abroad. This policy commitment is reflected, to varying degrees, in legislation and guidelines that govern the involvement of Australian officials in processes that could lead to the imposition of the death penalty abroad, namely through extradition, mutual assistance in criminal proceedings and police-to-police assistance. As things now stand, the *Extradition Act* effectively functions to prevent the extradition of persons where they might face the death penalty. Changes contained in the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act* extended these safeguards to waiver of extradition (consent to surrender) situations. There have been calls to tighten the extradition rules further, so that where the penalty is legally possible an undertaking from the requesting country will not be sufficient to permit extradition. However, there not yet been any instances of such undertakings being broken.

The *Mutual Assistance Act* is less categorical. It leaves significant discretion with the Attorney-General in cases where a person has not been arrested or detained. This creates the impression — and perhaps the reality — that Australia's opposition to the death penalty is equivocal when 'the interests of international criminal co-operation' are at stake.

In the area of agency-to-agency assistance, guidelines, not legislation, provide the rules. The present AFP Guide, compared with previous versions of recent years, seeks to better reflect Australia's opposition to the death penalty. Problems remain, however — a significant omission is the lack of any restriction on the reoccurrence of a Bali Nine scenario, that is, the volunteering of information to authorities abroad ahead of any request from a foreign agency and the arrest or charge of suspects.

Australia has more than two centuries of experience with law and practice when it comes to the death penalty. The slow, often unsteady, trajectory has been towards abolition. In this regard the 2010 Act is of undoubted importance, but does not mark the final legislative and policy changes needed to reach that goal. Despite continued affirmation of Australia's stance against the death penalty, it cannot yet be said that present policies and practices fully live up to that commitment.