CAPITAL PUNISHMENT IN QUEENSLAND

by

Ross Barber

A thesis submitted as part of the requirements for a Bachelor of Arts Honours Degree in Government.

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CHAPTER 1.
"INTRODUCTORY MATTERS".

Queensland Takes the Initiative

"The sentences of punishment by death shall no longer be pronounced or recorded, and the punishment of death shall no longer be inflicted", so reads Section 2 of the Criminal Code Amendment Act of 1922. When, on August 1st of that year, the assent of the Governor was announced in Parliament, Queensland became the first part of the British Empire to have abolished capital punishment. New Zealand took this course in 1941, but in 1950 it was considered necessary by the Government of the day to reintroduce the death penalty.

In the Australian states other than Queensland, capital punishment still exists but has fallen into disuse in Tasmania and New South Wales. The present position in South Australia is that both capital and corporal punishment are in abeyance. Following the report of the Stuart Royal Commission in that State, all death sentences were commuted by the Playford Government until the case of the murderer and rapist Valance, who was hanged for murder in 1964. In practice the actual carrying out of the death penalty in all Australian States has been limited to cases of murder and treason (the latter only during war time) for a good many years. Of the 24 executions

1. There has been no execution in Tasmania since 1946, although there has been no official announcement by any of the several Tasmanian Governments since then of the death penalty being in abeyance. No New South Wales Government has considered it necessary to carry out an execution since 1939, and in 1955 the death penalty was limited to piracy with violence and treason.
that have taken place in Victoria since 1901, only two were for crimes other than murder, although the number of capital offences was not limited to the "traditional" ones of murder, treason, and piracy until 1949. Prior to that, included in the long list of capital offences were rape, setting fire to a dwelling house people therein being put in fear, poisoning or wounding with intent to kill, and robbery with wounding. Only two of the 52 persons convicted of these offences since 1901 were, however, hanged. There have been but four hangings in Victoria since the Second World War—three in 1951 for the same murder, and one in 1967.

Despite the publicity created by the decisions of the Bolte Government in regard to the Tait and Ryan cases, if any Australian State is to be called the "hanging State", it would seem that Western Australia, and not Victoria, is by far the more deserving of the title. Although there have been only 12 executions in that State since 1922, the year capital punishment was abolished in Queensland, the tendency has been for the frequency of executions to increase in recent years. Since June, 1960, four men have been hanged in Western Australia.

Private Member's Bills seeking an abolition of capital punishment have been introduced in Victoria and Western Australia in 1961 and 1964 respectively, but have failed to pass their

Second Reading stages.  

Government Bills to the same end have been introduced into the South Australian and Tasmanian Parliaments, but have also failed to secure a successful passage. The various Tasmanian attempts were rejected by that State's Legislative Council, while the 1965 South Australian Bill was introduced too late in the session to enable the debate on it to be completed before the close of session.

In contrast to the other States, the last execution in Queensland was in 1913; the last for an offence other than murder had been in 1892; the Criminal Code of 1899 had reduced the number of capital offences to four (murder, wilful murder, piracy with violence, and treason), and the Offences Against the Person Act of 1865 had removed all other offences, except rape and robbery under arms with wounding, from the "capital" list. Yet, it should not be assumed that hangings were in any way rarities in Queensland before 1913. From December 1859 to September 1913 there were 81 executions in Queensland, 65 being for murder. The total number of executions in the various colonies has not proved to be accurately ascertainable. From the average numbers, during certain periods, given in the

1. A further attempt at introducing such a bill is to be made in Victoria this year - 1967.

2. Although abolition was in the Labor platform at the 1915 election and a Bill to this effect was introduced (and defeated in the Legislative Council) in 1916, there seems to have been no official administrative announcement as to the death penalty being in abeyance.
Courier's editorial of the 13th July, 1922, however, the following comparisons can be made:

<table>
<thead>
<tr>
<th>Year</th>
<th>(1) Average for all colonies</th>
<th>(2) Approximate Total</th>
<th>(3) Queensland Total</th>
<th>(4) Queensland average per year</th>
<th>(5) Average Colony per year</th>
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<td>1860-80</td>
<td>9</td>
<td>189</td>
<td>34</td>
<td>1.62</td>
<td>1.5</td>
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<tr>
<td>1881-1900</td>
<td>6</td>
<td>120</td>
<td>27</td>
<td>1.35</td>
<td>1.0</td>
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<tr>
<td>1901-10</td>
<td>4</td>
<td>40</td>
<td>16</td>
<td>1.6</td>
<td>0.67</td>
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<tr>
<td>1911-20</td>
<td>2</td>
<td>20</td>
<td>3</td>
<td>0.3²</td>
<td>0.33</td>
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<tr>
<td>(to 1913)</td>
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Total (1860-1920) = 369

Average per year = 6.05

Queensland Average per year = 1.31

Average per State per year = 1.01

Average Total per State (1860-1920) = 61.5

Total for Queensland (1860-1920) = 80.0

In all States since 1901 there have been 111 hangings.

Of the 60 prior to 1920, nineteen or 31.7% were carried out in Queensland. It should be remembered that at no time was the

1. This can be but approximate since only the average for all colonies was given (in whole numbers) by the Courier. I have also assumed that these averages were based on the existence of 6 colonies at all relevant dates.

2. The average to 1913 would be 1.0; but, as executions were still practical possibilities until Labor's victory at the polls 1915, a better figure might be 0.6 (i.e. 1911-15).
population of Queensland comparable in size to those of Victoria or New South Wales, thus making comparisons of columns 6 and 7 in Table 1 less favourable to this State. Obviously a better comparison could be made if executions were related to convictions for capital offences in the various States, but this has proven impossible because of the absence of reliable statistics. More shall be said on this matter shortly, but for now it is sufficient to, regretfully, express concurrence with Mr. Justice Barry's comment that, "In this country there are no useful statistics relating to crime ... compiled on a national basis. Each State has criminal statistics of a sort, but no competent person would claim they are adequate. Further, the criminal statistics of any State are not capable of any but a crude and primitive (and often misleading) comparison with those of the others."¹

It would seem, however, that the crime rate was lower in Queensland than in New South Wales, Victoria and West Australia, although higher than that in South Australia, for the period 1860-1901.² Despite crimes arising from racial clashes between Chinese and whites on the gold fields, Kanakas and whites in the sugar cane growing areas, and Aboriginals and squatters in the Western, far Northern and Gulf regions of the State, and those

due to excessive drinking in the hot sub-tropical climate, the proportion of "serious crimes" (not defined) per 1,000 of the population tended to decrease during this same period. In 1861 there were 0.8 serious crimes per 1,000 people, while in 1891 the figure was 0.59. In 1881 it had fallen to 0.43, thus showing a slight increase by 1891.

ENGLISH TRADITIONS.

The law as it existed in Queensland on separation in 1859 consisted of so much of the common law and Statute law of England (as of 1828) as was generally applicable to New South Wales, any Statute law passed by the New South Wales Legislature since 1828, and any Imperial Statutes passed after 1828, which were either of specific application to the colony or of general application to all colonies. It may thus be advisable to briefly trace the changes which had taken place in the penal code of England in order to more fully understand the traditions and values which the young colony, with its many English trained lawyer-politicians, inherited in 1859.

During the Middle Ages the death penalty was exacted for only serious offences and, although punishment became more severe under the Tudors and Stuarts, and several felonies were added to the list of capital offences, the total number of capital

1. ibid.

2. These included marrying a woman forcibly, arson, sodomy, stealing by a servant from his master of goods to the value of £2, house-breaking, stabbing an unarmed person if he died within six months, and stealing from ships in distress (aimed at the "wreckers" in Cornwall) — per Pollock, during the second reading debate on the Criminal Code Amendment Bill, 1916. (Q.P.D. Vol. CXX III pp. 563-4).
felonies, by 1700, was no more than 50. By 1820 the total had grown to 220 and included many trivial offences (if indeed offences at all by modern standards), such as stealing turnips, consorting with Gypsies, picking a pocket, shop-lifting, and being found disguised in a rabbit warren.¹ At the end of the seventeenth century England's penal laws had been substantially the same as those existing in most European countries, but the incredible increase in the number of capital felonies, chiefly aimed at the protection of property, was such as to cause Sir Samuel Romilly, "the founder of the English movement for the abolition of capital punishment",² to say in 1810: "There is no country on the face of the earth in which there (are) so many offences according to law to be punished with death as in England".³

It has been said⁴ that Romilly opposed capital punishment on the following two grounds:—

(1) That the chief deterrent to crime resided not in barbarous punishments, but in the certainty of detection⁵ and conviction, and that harsh punishments tended to diminish the likelihood of convictions; and

⁵. There being no effective police force prior to 1829.
(2) That brutal punishments accustomed the people to brutality and tended to create attitudes conducive to the committal of crimes of violence, on the basis that violence bred violence and cruel punishments inevitably produced cruelty in the people.

Although a "Society for the Diffusion of Knowledge upon the Punishment of Death" was formed in 1810, its members were not abolitionists, but were merely desirous of having the number of capital offences reduced. Quite substantial support for this was found in the House of Commons, but the Lords, particularly the Law Lords, were strongly opposed to any such alteration. A bill to abolish the death penalty for shop-lifting passed the Commons and was rejected by the Lords in 1810, 1811, 1813, 1816, 1818, and 1820. It was finally accepted by the House of Lords in 1823.

The chief reason expressed by the Judges in the Upper House for opposing any relaxation of the penal code was that the fear of death was all that could protect person and property in "the degeneracy of the present time, fruitful in the invention of wickedness."¹ Lord Ellenborough felt that the lifting of the death penalty for shop-lifting would be "opening the gates to revolution", and declared: "Mr Lords, we would not know whether we were on our heads or our feet."² He, and other

Judges, maintained that there was no suitable alternative punishment, and that, in particular, transportation was simply "a summer's airing by immigration to a warmer climate."¹

Gardiner and Curtis-Raleigh, in commenting on the conservative influence the Judiciary has played in English penal reform, particularly in regard to the numerous Shoplifting Bills, state that "laymen seemed reluctant to put their views against those (the Law Lords) who put themselves forward as experts and were so regarded."² [A somewhat similar practice continued in Queensland until the passage through the Legislative Assembly of the Criminal Code Bill of 1899, when the members of the Labor Party refused to forfeit "their right (of debate) because the Bill had been before a Royal Commission of Judges."³

Indeed, Fitzgerald (the only lawyer in the Labor Party at the time and later that same year to be the Attorney-General in the first, if transitory, Labor Government) thought that the question of punishment, capital and corporal punishment in particular, "was one that might be discussed very well and very much to the point outside the (legal) profession as well as in it" and objected to the fact that "not a single laymen

had been asked to consider the Bill.\[1\]

However, despite the strong opposition from the House of Lords, which had resulted in a reduction of only three capital felonies from the list of 220 by 1820, changes in the penal code were soon to come, for juries became increasingly unwilling to return verdicts of "guilty" in cases of offenses against property. They began to bring in obviously "unreal" verdicts in order that the sentence of death should not be passed. For example, where a stealing offence was a capital one only where goods above a certain value were involved, they would find that the value of such goods was just below the minimum required for the capital charge. In cases where no such "minimum value" findings were available juries frequently found seemingly obvious offenders "not guilty". So difficult did it become to obtain a conviction for forgery that a large deputation of bankers and merchants awaited on the Government urging that the offence cease to be punishable with death, in order that offenders might be punished and the frequency of the crime reduced.

Steadily and swiftly progress was made in the direction of limiting the number of capital felonies. In 1829 the last execution for forgery took place and the last for sheep stealing in 1831.\[2\] House-breaking ceased to be punished with death in 1833.\[3\]

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2. The Worker, 5/1/1907.
3. Ibid.
By 1837 the number of capital felonies was 151 and by 1861 there were only four offences for which death was the punishment - high treason, murder, piracy with violence, and destroying public dock-yards and arsenals. The latter ceased to be a capital offence in 1955. Since 1838, however, there have been no hangings in England for offences other than murder and treason, and for the latter the death penalty has been carried out only during wartime.

A Royal Commission of 12 to investigate capital punishment was appointed in England in 1864. Its findings supported the contention that juries were reluctant to convict in any but very serious capital cases, and recommended that the numbers of capital forms of homicide be reduced. It also recommended that hangings should no longer be held in public. Although the Commission as a whole did not advocate complete abolition four of its members (Stephen Lushington, John Bright, Charles Neate and William Swart) appended to the report their opinion that "capital punishment might safely, and with advantage to the community, be at once abolished."3

In 1908, a Bill abolishing the infliction of capital punishment on infants under sixteen passed through both Houses of Parliament and, in 1922, the killing by a distressed mother

of her newly-born child was declared to be a non-capital offence. These changes, especially the latter, resulted from a "revival of abolitionist activity", encouraged by the British Labor Party. In 1921 the Howard League was founded and this was followed in 1925 by the National Council for the Abolition of the Death Penalty. It is submitted, however, that this "revival" in Britain had little or no influence on Queensland, since the first Legislative attempt, defeated in the Legislative Council, to abolish capital punishment had come in 1916, and abolition had been in the Labor Party's General Programme since the Labor-in-Politics Convention of May 1910.

MODE AND MANNER OF EXECUTIONS:

Except for the burning of witches and, heretics and the occasional beheading of traitors, the traditional method of execution in England since the Middle Ages was by hanging. The reason for this is not clear, but, bearing in mind the facts that hangings were originally held in public and that death was caused by strangulation, not, as with the more modern trap-door system, by dislocation of the neck, the British Royal

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1. The offence was called "infanticide" and was a category of manslaughter - a non-capital offence.


3. The Act passed during the reign of George III which provided for the be-heading of traitors was, technically, still in force in Queensland until the proclamation of the Criminal Code on January 1st 1901.
Commission on Capital Punishment (1949-53) suggested that 

"(Hanging) may be presumed to have been invented more for its advertisement value than as a more effective way of taking life than earlier methods... Hanging inflicted a singular indignity on the victim in a uniquely conspicuous fashion. It displayed him to onlookers in the most ignominious and abject of postures, and would be likely to enhance the deterrent effect of his punishment on anyone who might be tempted to do what he had done. Hanging caused a slow suffocation, the victim's last agonies would be a warning not soon forgotten by the crowds that watched him."¹

Any deterrent effect of witnessing hangings would not seem, however, to have been very great. Instead of being solemn occasions, executions were treated more as a source of free entertainment. There were only eleven public holidays in England - Christmas, Easter, Whitsun, and the eight execution days at Tyburn,² and the masses of London took full opportunity of the entertainment provided. Any deterrent value of the hangings was apparently lost on the pick-pockets who were "rife in the watching crowds,"³ and who, if caught, would have provided

2. Hollis, op. cit., p. 9
the object of entertainment at the next execution day.

Furthermore, the Royal Commission of 1864 found that of the 167 persons lying under sentence of death at Bristol, 161 had witnessed a public execution.

The *Daily Telegraph*, commenting on the execution of five mutineers in 1864, objected strongly to public hangings and evidenced a certain hostility to capital punishment itself:

"In grimy, haggard thousands, the thieves and prostitutes of London gathered around the foot of the gallows, jamming and crushing each other for a share in the spectacle ... Let us ask if such a sight was wisely furnished, since we cannot call in question its justice, so long as blood is purified with blood and a Mosaic Law governs a Christian Nation."¹

Pursuant to the recommendation of the Royal Commission of 1864–8, public hangings were abolished in England in 1868, May 26th of that year being the day on which the last public hanging took place.²

At first, hangings were public affairs in the colonies too, and the hanging of three bushrangers in Victoria in 1842 was said to have been watched by a crowd of "not less than 7,000."³ By 1850, however, "Victorian crowds had shrunk to mere hundreds, and women no longer predominated".⁴


² Following a report on capital punishment in 1888, which revealed a number of badly mismanaged executions, the press was excluded from hangings in Britain. Similar action had been considered in Queensland in 1879, but there had been considerable opposition in Parliament to any such attempt to carry out executions in secret.


⁴ *Burns, op. cit.*, p.13.
There is mention by Johnston\(^1\) of public hangings being held near Brisbane prior to separation, but Lincoln\(^2\) maintains that there had been no public hangings in Queensland. Assuming he means since separation, there need be no inconsistency between the two opinions. The present writer can add but little either way except to say that the reports in the *Courier* of the three executions between 1860 and 1865 made no mention of their being held in public, and, given editor Pugh's opposition to capital punishment, it is unlikely that he would have offered no words of criticism or censure to such public displays.

At all events, the Criminal Practice Act of 1865 put the issue for the future beyond doubt by providing that hangings were to take place within the walls or the enclosed yard of the jail.\(^3\) It also provided\(^4\) that "the bodies of persons executed ... shall be buried at such places as the Governor, with the advice of the Executive Council, shall direct." This provision was "thought advisable for, otherwise, if friends of an executed man demanded his body for the purpose of exhibiting it - as had been done in the past - it would be difficult to show authority

\(^3\) Section 58.
\(^4\) Section 65.
for refusing their demands.1 New South Wales would seem to have abolished public hangings at some date prior to May 15th, 1861,2 so both New South Wales and Queensland were ahead of England as regards reform in this aspect of capital punishment.

With the loss of the "advertisement value" of hangings and a growing concern for the suffering the victim endured in being slowly strangled to death, the need was seen for a more efficient3 and painless method of execution. However, the British practice of hanging was retained, with the victim being dropped through a trap-door, causing a swift death by virtue of the dislocation of the neck. At times, mistakes occurred, with the victim's skin being broken and blood being shed, or, as happened in Queensland in 1879,4 his head being torn off.

2. See Lilley on the Second Reading debate of his Criminal Law Amendment Act, 1861, in the Courier 22/5/1861.
3. It seems that on one occasion the victim was able to release his arms from the bonds and release the pressure of the rope around his neck, — see G.R. Scott, The History of Capital Punishment, Torchstream Books, London,1950.
4. During the debate on Griffith's Motion for the Adjournment of the House on the execution of one Mutter, Paddy O'Sullivan commented that "it was obvious that there had been a bad tradesman at work - The Colonial Secretary should pay some attention to this matter and see that when people were hanged, their heads did not remain up and their body go to the ground" — Q.P.D. (1879), Vol. XXIX, p. 343.
Such spectacles caused a good deal of public horror, and were used by abolitionists as the basis of attacks on capital punishment; but it is unlikely that such "accidents" caused the criminal any additional suffering. The Royal Commission of 1949-53 was able to report that, by virtue of improved hanging techniques (there had even been a Royal Commission on the matter in Britain in 1886):-

"A method of execution, whose special merit was formerly thought to be that it was particularly degrading, is now defended on the ground that it is uniquely humane."¹

Executions were usually performed by a man employed by the State for this purpose and, certainly by 1899, each Australian colony had its own official hangman. Earlier in the century, a convict was often appointed to perform this operation, some being rewarded by the granting of a ticket of leave.² However, this practice was soon found to be unreliable in Queensland, and in December 1861 no convict could be found who was willing to act as hangman at the execution of an aboriginal found guilty of rape. The Sheriff complained of the practice of leaving the task to fellow convicts since they were apt to "turn coward at the last moment."³ An executioner was finally appointed in February of the following year.

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THE DECISION: TO HANG OR NOT TO HANG?

Following the abolition of public executions in England, the practice appeared to be that a condemned man would be executed 21 days after being sentenced. In Queensland, however, such was not the case, for the judge's sentence was that the prisoner be hanged "on a day appointed for his execution by the Governor-in-Council." The judge would then forward to the Home Secretary his report on the trial, together with any recommendation for mercy made by the jury and his own views on the propriety of carrying out the death sentence in the particular case. For capital offences other than treason or murder (later treason and wilful murder after the proclamation of the Criminal Code), the judge had the power of refraining from pronouncing the death sentence in open court, and of having such a sentence merely recorded against the prisoner. This was the practice to be followed when, in the trial judge's opinion, the criminal, although guilty of a capital offence, should not, for reasons of mercy, suffer the extreme penalty for his crime. There was, however, no difference, apart from this strong indication of the Judge's opinion, between recording or pronouncing sentence. It should be noted too that the death penalty was the mandatory sentence for all capital offences in Queensland, and the judge had no power to impose a lighter

2. Sometimes the Attorney-General was the appropriate Minister. This seems to have been the position in March,1880.
penalty once the criminal had been convicted of the capital charge.

After receiving the judge's report the Home Secretary would make his recommendation to the Governor. Copies of the report would then usually be sent to all members of the Cabinet and the final decision made at a meeting of the Executive Council. However, the extension of mercy to a condemned man being a royal prerogative, it was exercisable in the colonies by the Queen's representative - the Governor - who was in no way bound to accept his Minister's recommendation in such cases. Clause 12 of Her Majesty's Letters Patent of April 13th, 1877 clearly endorsed this position by instructing colonial Governors to grant a pardon or commute a sentence in capital cases "according to (their own) deliberate judgment" regardless of the view of their constitutional advisers, so long as such advice was at least received. Sir Anthony Musgrave found cause in May, 1887 to exercise this power, and commuted the death sentence, passed on one Muller for the rape of a married woman, to life imprisonment. The decision was contrary to the wishes of the majority of the Griffith's Cabinet.

The Courier reacted unfavourably towards Musgrave's decision - "He has the right", its Editorial observed, "but we question the expediency of retaining this right and this particular exercise of it ... the retention of the prerogative is an anomaly. We do not blame him but we blame the system that
gives him the right to dispense with the advice of his Ministers."¹

Griffith was almost certainly among those of the Cabinet favouring execution in this case. In passing sentence on Muller, the Chief Justice, Sir Charles Lilley, had commented that "it was the grossest case of the kind in the annals of the colony",² and Griffith, even as late as 1899, was a strong, if reluctant, supporter of rape remaining a capital offence in Queensland. Griffith the constitutional lawyer, however, was apparently stronger than Griffith the politician, for, at a subsequent Colonial Conference, he expressed the view that the power given to colonial Governors in capital cases was "an anomaly, justified at the present time."³

Colonial governors were soon to lose, in practice if not in theory, most of their power to act contrary to the advice of their Ministers. The reply sent by Lord Nutting to Governor Musgrave in 1888, in reference to the case of Benjamin Kitt, upheld the Governor's legal right to disregard his Minister's advice, but urged that this should not be done unless there was good reason for so doing; especially should this be the case when purely internal matters were involved. Musgrave's successor (Sir W.H. Norman) seemingly offered no resistance to the release of the "Hopeful" prisoners in 1890, despite the

1. The Courier, 24/5/1887.
strenuous efforts of Chief Justice Lilley in opposing any further exercise of mercy on their behalf. Lilley stressed the fact that the men had been convicted of offences against Imperial Law, the crimes (murder and kidnapping of Kanakas) having been committed on the high seas. He argued from this that, unlike the Kitt case, this was not a "purely internal matter", but that Imperial interests were involved. However, in view of the instructions sent from Britain in 1868, the governors of Queensland no longer seemed to feel justified in opposing the advice of their Ministers on questions of extending mercy to criminals. The Kitt case appeared to be really in the nature of a "test case", preparatory, to the Government carrying out its election promises to see that "justice" was done to these condemned men.

Even in capital cases, the Governor's power would appear to have been no longer of practical consideration. Certainly the much-deputationed Governor in 1902-3 (while Patrick Keniff lay under sentence of death) never indicated that he could do more than summon an Executive Council meeting to re-consider the decision to hang Keniff. This was done, but the decision remained unaltered. Sir Arthur Morgan¹ put his position clearly to the deputation seeking a commutation of the death sentence passed on Arthur Ross in 1909 when he said:

¹. Morgan was the Acting-Governor at the time, but would have had the same power in this respect as a Governor.
"There is a popular misconception of the Governor's position - I must act on the advice of my Ministers. All I can do is promise to lay all you have put forward before the Executive Council". ¹

Just when decisions in capital cases became Cabinet decisions, with endorsement by the Executive Council following automatically, is not then exactly known; but it does not appear unreasonable to assume, in the absence of any evidence tending to the contrary, that the change can be dated from the 1888 reply by Lord Nutting to Governor Musgrave. This assumption is supported by the fact that, in 1892, Premier Griffith advised a deputation seeking mercy for the murderer Horrocks that it would be pointless waiting on the Governor, since he would only refer them back to the Executive. ²

THE PURPOSE OF CAPITAL PUNISHMENT

Another quite noticeable change, which may be seen taking place during the period studied, is in the conception of the purpose of capital punishment. Briefly, for this will be shown in more detail at later stages, it may be said that its chief purpose, in the middle of last century, was retribution, with deterrence being ancillary to this. Gradually the deterrent aspect took on a less vindictive nature. Society was to be protected, but the onus shifted somewhat in favour of commutation. Whereas at first the carrying out of the death penalty had been almost automatic, unless substantial reasons

¹. Courier, 7/6/1909.
². Courier, 23/9/1892.
could be shown for the exercise of mercy, soon less had to be urged on the prisoner's behalf in order to secure a commutation (for example that he was ignorant of English Law or that he had had no moral education - such came to be rather frequently urged, often with success, when the condemned man was a non-European). Later still, the onus came to be in favour of commutation unless the crime was a particularly brutal or ruthless one.

With the rise of an effective and vocal Labor Party in Parliament, reformation of the criminal came to be accepted as being of at least some importance in the consideration of suitable punishments. The Socialist elements in the Labor Movement considered crime a "social product", caused by environment, and carried by heredity to subsequent generations. Given such an outlook, it is little wonder that any notions of retribution or vindictiveness being ingredients of punishment should have been quite repugnant to such men, and that they should have been such strong opponents of capital and corporal punishments, solitary confinement, and the use of "dark cells".

1. Certainly this opinion was openly expressed by the Courier and many of its readers in 1897 during the successful agitation on behalf of the rapist Smith.
OTHER ABOLITION STATES AND THE PROBLEM OF INCONSISTENT
QUEENSLAND STATISTICS.

Two final points. Firstly, although Queensland led
the British Empire with regard to the abolition of the death
penalty, she was by no means a world-leader in this matter.
Luxembourg has been credited with being the first to take
this step in 1832\(^1\) (the year a man was hanged in England for
stealing buttons).\(^2\) Portugal and Holland followed in 1870,
and Italy in 1888. At the time of formal abolition in
Queensland, at least nine of the States of the United States
of America and seventeen of the twenty-one Swiss cantons
had also removed the death penalty from their penal codes.
Chile abolished capital punishment just a matter of weeks
before Queensland.\(^3\) By 1962 there were some 32 Abolition
States.\(^4\)

Secondly, the matter of conflicting and completely
irreconcilable statistics calls for comment. Originally,
it had been hoped that reference to statistics would allow
of some reasonably accurate decision being reached as to the
merits of the argument, used at various times by opponents
of capital punishment, that juries, in their abhorrence of
condemning a man to death, perhaps even an innocent man,
committed "pious perjury" in tending, in all but the most
clearly proven and brutal cases, to either acquit criminals

\(^1\) Burns, op. cit., p.11.
\(^2\) The Worker, 5/1/1907.
\(^3\) The Worker, 27/7/1922.
\(^4\) Burns, op. cit., p.11.
altogether, or at least, to find them guilty of a lesser, non-capital, crime - for example manslaughter when the charge was murder, or indecent assault when the Crown was pressing a rape charge. Unfortunately, it has proven possible to offer but tentative conclusions, owing to the statistical inaccuracies discovered in the figures of convictions for various offences given in the Police Commissioner's Reports. It had been expected, since these returns showed the sentence (either death, imprisonment, fine etc.) actually passed on convicted men, and since the death penalty was a mandatory penalty, that the number charged with (for example) murder and sentenced to death would be the number actually convicted of murder, while the number charged with murder, but given a sentence less than death, would give the number who, although initially charged with murder, had been convicted of manslaughter only.

However, on comparing the statistics given in (a) the Comptroller-General of Prisons Reports, (b) the return of convictions sent from Queensland at the request of the British Royal Commission on Capital Punishment of 1949-53, and (c) the statistics of crime published in the yearly statistics of the State, there is scarcely any single year in which either of these returns agree with those of the Police Commissioner's, nor, indeed, with each other. The Prison Reports are misleading because, when, as was quite usual
with condemned men, a man was initially sent to one prison and later transferred to another (the custom being to hold most executions in Brisbane and send "lifers" to St. Helena), he would be recorded among "prisoners received" in both jails; thus preventing the number of condemned men for the year being attained by a simple addition of the numbers of such received in the various prisons.

An obvious example of one discrepancy between the Police, Royal Commission, and Annual Statistics is seen in the figures given by each for 1904:

<table>
<thead>
<tr>
<th>Source</th>
<th>Convicted of Murder</th>
<th>Convicted of Manslaughter</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>0 (i.e. none sentenced to death).</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>Royal Commission</td>
<td>4</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Annual Statistics</td>
<td>4</td>
<td>12</td>
<td>16</td>
</tr>
</tbody>
</table>

Since at least two people (Mr. and Mrs. Macdonald) were sentenced to death that year, although not executed, considerable doubt is thrown on the Police Statistics. This doubt is reinforced by the fact that these statistics, in neither the preceding nor following year, indicated that a woman was so sentenced.

After referring to the statistics of executions taking place each year (found in both the Annual Criminal Statistics and the Government Gazettes), it would seem that only the
convictions given in the Annual Criminal Statistics are, at all relevant times, compatible with the executions. Whether these criminal statistics are correct it is no longer even dared to suggest, but at least they appear to be the least inaccurate. Unfortunately, they are not as detailed as those given in the Police Commissioner's Report, giving only actual convictions for the offence charged. Thus, a man charged with murder but convicted of manslaughter would appear under "acquittals for murder" and again under "conviction for manslaughter". This, of course, renders impossible a calculation of how many charged with murder in a given year were actually found guilty of manslaughter. Thus in 1914 when one was convicted of murder and four acquitted and five were convicted of manslaughter and two acquitted, it is probable that some of those acquitted of murder were convicted of manslaughter, but further than that it is impossible to say. Unless otherwise expressly stated, then, all statistics quoted will be based on these Annual Criminal Statistics, to be found, usually, in the "Votes and Proceedings" or "Parliamentary Papers" of the year following that of the statistics given.
CHAPTER 2.
THE SEMI-PROPERTY OFFENCES AND TREASON

(a) BUSHRANGING.

Contemporaneous with the discovery of gold, most of the Australian colonies experienced an outbreak of bushranging. This was particularly so in New South Wales and Victoria, but bushranging in Queensland was never very closely associated with gold, the daring robbery of the Clermont gold escort by Gold Commissioner and Police Magistrate Griffin in 1868 being a notable exception. After accompanying the escort for part of their journey and failing in an attempt to poison them, he returned to their camp the evening after his leaving them, shot and killed all three and escaped with money.\(^1\) He foolishly lost no time in using some of the bank notes and was hanged for murder later that year, the gold being recovered by virtue of a map the condemned man had used in an attempt to bribe his jailors.

The great epidemic of bushranging which struck New South Wales and Victoria in the 1860's never really spread to Queensland. Admittedly an occasional mail coach was held up; the first such occurrence was on the Darling Downs in 1864.\(^2\) Further instances took place around Rockhampton, where Hartigan, Fagan, Hunter and "the Snob"\(^3\) caused a certain degree of concern, but in the main, these culprits were

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2. Ibid., p.251.
horse-stealers rather than bushrangers. Only Alphine Macpherson, "the Wild Scotchman,"¹ and later, in 1880, Johnny Campbell were of any real consequence.

However, such was the extent of the outbreak in New South Wales, that Herbert's Squatter Ministry in 1865 considered it expedient to include the following section in the Larceny Act of that year:

"Section 44. Whosoever shall being armed with any kind of loaded arms rob or assault with intent to rob any person and at any time of or immediately before or immediately after such robbery or assault shall by discharging the said loaded arms wound any person shall be guilty of a felony and being convicted thereof shall suffer death as a felon."

It was fully acknowledged by the Government that the provision was not strictly necessary in Queensland, but it was considered advantageous to pass such legislation in case it should later become necessary "to meet the conditions which have arisen in the other colonies and which New South Wales has not yet been able to cope with."² "It becomes us", Pring continued, "to provide for every conceivable evil and to provide a remedy for it, as far as we can, and not leave it to be amended by and by when the evil arises."³

1. As spelt in O'Sullivan, op. cit., p.264.
2. Report of the speech of the Attorney-General, Pring, on the the Second Reading of the Larceny Bill - the Courier, 1/7/1865.
3. Ibid.
Although Pugh (former editor of the *Courier* and an opponent of capital punishment) and Brookes and Edmonstone (of whom more will be seen shortly) were in Parliament in 1865, this extension of Capital Punishment went unchallenged in the Legislative Assembly, and only R.J. Smith (who resigned his life appointment the next year) spoke against it in the Legislative Council. No specific comment was made in the press either by way of letters from readers or editorials, although the *Courier* favoured an increase in the severity of punishment generally. The Larceny Bill had been one of the six Bills on the Consolidation of Criminal Law in Queensland introduced by the Attorney-General that year, and Chief Justice Cockle had assisted in their drafting. It would seem, then, that most elements within the State approved of, or acquiesced in, this rather retrogressive step.

**SECTION 44 IN OPERATION**

In December, 1859, William Brown (or Bertram— he refused to give his real name), a German of scarcely 20 years, robbed a hotel near Toowoomba and, after firing two warning shots, wounded the owner who had tried to prevent him escaping. He was tried in Toowoomba in July, 1878, and sentenced to death under the provisions of the Larceny Act. The Executive Council set Monday August 29th as the date for his execution.

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1. The *Courier*, 5/7/1865.
in Toowoomba jail. Judging from the brief reports of happenings in Toowoomba that appeared almost daily in the Courier, there was no adverse reaction to Executive Council's decision in that town.

However, on the Thursday prior to the appointed day of execution, a letter from "Justice" appeared in the Courier, calling attention to Brown's impending fate and urging that in view of his youth, his ignorance and his previous good conduct, and the fact no life had been taken, the Courier and the public ask the Executive Council to extend the prerogative of mercy to him. The same Thursday, a deputation consisting of Hon. J.C. Heussler (M.L.C.), H. Jordan (M.L.A.), G. Edmonstone (M.L.A.), and Messrs. Filby and Pint awaited on Palmer with "an influentially signed memorial addressed to the Governor" praying for a commutation of Brown's sentence. Arguments identical to those of "Justice" were urged by the deputationists.

"The Colonial Secretary replied that the deputation was misinformed as to the facts of the case, that the prisoner was a notorious offender, that he was in the 'hue and cry'.

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2. His interest in this particular case can no doubt be partly explained by the fact that Brown was German. It is not certain if he held these positions at the time but, in the mid-1880s, Heussler was the Consul for the German Empire and the President of the Deutscher Club.
3. As early as 1860 he had expressed his opposition to capital punishment - see over at p. 55.
4. The Courier, 26/7/1870.
of New South Wales, and that both the Executive Council and the Judge felt that if the law did not take its course in this case, it would in the future be inoperative. He stated emphatically that no petitions or efforts would save him from the extreme penalty of the law."

Two further letters appeared in the Courier, another from "Justice" (who, since his letter attacked statements of Palmer's only reported in the Courier the same day as the letter appeared, was certainly either a member of the deputation or closely connected with it) and one from T. Pellatt of Moggill Creek. Both urged a commutation of sentence, since, "as no life was taken, the prisoner's life should be spared." "Justice" brought politics into the issue by claiming that "Pring's Act making this a capital offence (was passed) in a spurious state of excitement," and by drawing attention to "an anomaly that no person can understand," in that the Executive Council had recently commuted the death sentences passed on two murderers (Boweman and Herrlich) to life imprisonment.

The Executive, the Courier and the general public,

1. Courier, 26/7/1870
2. Courier, 26/7/1870
3. Letter by T. Pellatt, Courier, 26/7/1870
4. Letter by "Justice", Courier, 26/7/1870
5. Ibid.
however, remained unmoved by the small group's urgings, and, on the appointed Monday morning, Brown was hanged. The entire matter apparently passed without much notice being paid to it by anyone apart from the few already mentioned. Certainly Dr. Izod O'Doherty, who was campaigning at the time for the forthcoming, and for him successful, election for the seat of Brisbane in the Legislative Assembly, would seem to have remained oblivious to it.

A Change in the Attitude of Town Dwellers.

The 1870's saw a further decline in the never particularly serious frequency of bushranging in the State and with it the hitherto rather severe application of punishment for such crimes was relaxed. By virtue of public petitions, together with the good conduct and failing health of the convicts themselves, two armed mail robbers had their sentences (18 and 17 years respectively) shortened by some 11½ and 13 years respectively, in 1875. In the same year, two serving 20 year prison terms for highway robbery were released after completing only 9½ years of their sentences.

By 1880, however, there had been a revival of bushranging in the Southern colonies where the Kelly Gang was at large, and "Johnny Campbell", the Black Bushranger, had the Nambour - Gympie District in a state of alarm. He was said to have killed

1. Assumed on the basis of his remarks in 1880 that Wells would be the first to suffer death for armed robbery with wounding.
3. Ibid, p. 507
a black-tracker who had been trailing him, and was finally captured and turned over to the police by fellow Aboriginales. He was executed, not for murder but for rape, in July 1880. It was during this excitement that Joseph Wells was tried in Toowoomba¹ before Lilley C.J. on a charge of robbery under arms with wounding committed at a bank in Cunnamulla.

Numbered among the many unfortunate aspects of the trial, and on which the major arguments of those who were later to seek a commutation of his sentence were based, were the facts that Wells had been unaware that he faced a capital charge and that he was unrepresented by Counsel, which caused him both to plead "guilty" and to be denied the opportunity of having evidence tending to show that the shooting was either accidental or intended only as a warning being placed before the jury. On the Judge's advice his plea was changed to "not guilty", by reason of his claim that the gun had gone off accidentally, but much of the damage had by then been done. Lilley C.J. in "as clear and impartial a summing up as was ever delivered from a Bench",² impressed upon the jury that, in order to find Wells guilty, they must be convinced that the firing had not been accidental. But, with no evidence being adduced tending to show this, the jury had little difficulty in returning a verdict of "guilty". Wells was sentenced to death and it was determined that

1. 16/2/1880

2. This appeared in the Toowoomba Chronicle, a newspaper which strongly opposed the decision to execute Wells, and was quoted in the editorial of the Courier, 20/3/1880.
that the execution should take place on March 15th, 1880.

This decision caused a great deal of public discontent in Toowoomba, Brisbane and, to a lesser degree, Ipswich. The Toowoomba agitation was led by the *Chronicle*, owned by W.H. Groom, who represented Drayton and Toowoomba in the Legislative Assembly from 1863 to 1901. Unfortunately, there appear to be no copies of the *Chronicle* for this period in existence in Queensland but it would appear, from the reports appearing in the *Courier*, that a large proportion of the population of Toowoomba were active in the campaign and a petition praying for a commutation of the sentence was sent to the Governor. Ipswich would seem to have been less involved on Woll's behalf, but George Thorn, the local member and son of the "founder" of Ipswich, and Solicitor G.F. Chubb, described by Johnston as being "exceptional as a leader in community life"¹ and as having "spent a lifetime contributing to the civic life of the community,"² both took part in the Brisbane campaign.

In Brisbane, the leading commutationists were Dr. Isod O'Doherty, M.L.C., who had been present at the trial, and William Brookes, who at the time was temporarily out of politics, but who had been in the Legislative Assembly from 1863 to 1867 and who was to return in 1883. The agitation in Brisbane lasted just two weeks, but during this time two deputations awaited on

Governor Kennedy, one on Attorney-General Pring who granted a week's postponement, a public meeting attended by some 150 persons, was held in the Chamber of Commerce Rooms, an appeal was taken before the Full Supreme Court, and finally a deputation awaited on Acting-Governor J.P. Bell, almost on the eve of the execution. In addition, Brookes wrote letters to the Telegraph and a petition was circulated in Brisbane and was "numerously signed".¹

In all, seven parliamentarians² not including Murray-Prior, Brookes and T.H. Fitzgerald (who had been the leader of the Central Squatter Bloc in 1868), and eight legal men,³ including some of the politicians, played an active and public role in the agitation, as did the journalists Mellifont and William Coote. A small number of business men also were involved. The churches remained aloof from the matter, as did the Mayor, who refused to act as chairman at the public meeting. Both the Courier and Telegraph withheld their support, with the Telegraph being quite severe in its condemnation of the efforts of the commutationists. It issued two hostile editorials and published four letters (two opposing and unsigned, and two, from Brookes and T. Jones of the Valley, urging a commutation on the matter), while the Courier was content to merely report on the various

¹ The Courier, 13/3/1880.
³ Messrs. Sherridan, Swanwick, Chubb, Rutledge, Bunton, Bruce, Garrick and Holicar.
stages of the agitation, and refrained from editorial comment
until after the appeal to the Full Court had been dismissed.
It then seemed torn between attacking Pring (who was without a
seat in Parliament and who had been the subject of earlier un-
favourable editorials) for granting a stay of execution for what,
it claimed, was an obviously baseless appeal,¹ and supporting
the previous decision to carry out the execution:

"Up to last week there was no doubt as to what
the fate of the convict ought to be — But
owing to the blame worthy weakness of the Attorney-
General a quite unnecessary difficulty has arisen —
By his action (in granting the reprieve) he had laid
a painful duty on his colleagues. The unhappy man
lying under sentence has tasted the sweetness of hope —
if he dies now he dies a double death. The reasons
for completing his sentence last Monday remain unaltered,
and yet humanity shrinks from the idea of snatching a
man from death for a few days, and then consigning
him to the gallows. — Whatever the decision
(the Government) may now arrive at ... the great
majority of the thinking public will understand their
difficulty and endorse their action."²

Their decision was that Wells should hang on the 22nd.

Acting-Governor Bell, although saying that nothing would be
more in accord with his own personal feelings³ declined to
interfere, having regard to the opinions of Governor Kennedy

¹ So assumed because of the ease with which the Court had
dismissed the appeal on the 19th March. But, even granting
that this was so, it is submitted that Pring acted correctly
in agreeing to the postponement.

² COURIER, 20/1/1880.

³ COURIER, 22/1/1880.
the Government, and the trial judge (Lilley C.J.) that there were no reasons for extending to Wells the prerogative of mercy.

The concern of many of the commutationists, particularly the members of the legal profession, stemmed from Wells' not having had the benefit of a defense Counsel when on trial for his life. The practice at the time was for the Government to set aside a sum of money to pay for the defense of Aboriginals and Kanakas (in capital and other serious cases), but not poor whites. Rutledge, M.L.A., based his protest against the execution solely on this ground, and his speech at a public meeting on Saturday, 13th March, was not without political overtones:

"He had no sympathy with maudlin sentimentality that considered it to be its duty to get up an agitation every time a criminal was sentenced to death. (But) a blackfellow, even when his offense was no worse than a serious assault, was always provided with counsel by the Government. There was no excuse for the Government, they went to the expense of employing able counsel for the prosecution and yet left the criminal destitute of the assistance they would furnish a common blackfellow."

Brookes later promised that "when Parliament met steps would be taken to prevent any man being tried for his life without being defended." But neither Brookes nor Rutledge took

1. Prince and S.W. Griffith had appeared for the Crown.
any real steps in this matter, though they remained in Parliament (although not continuously) until 1897 and 1904 respectively. Several times Rutledge was to be Attorney-General. Two members of the deputation (Chubb and Swanwick) were more personally involved than most, for, apart from their general interest in civic matters and seeming injustices, they had been present in court when Wells was tried and had been approached by Dr. O'Doherty, who, being appalled at Wells not being defended, had unsuccessfully solicited their assistance on his behalf. They had refused since to have voluntarily offered their services would have been contrary to legal ethics.

Few were prepared to publicly advocate the abolition of the death penalty for robbery under arms with wounding, but the general consensus of opinion of the citizens of Brisbane and Toowoomba would appear to have favoured such action. The Government and the two Brisbane daily newspapers, however, refused to accept such as argument.

"Dwellers in a town like Brisbane or Toowoomba," said the Courier, "are not fair judges of this matter. They are in no danger from bushranging by armed men prepared to carry out their nefarious designs even at the cost of murder. They have always policemen within hail - the very thickness of population around them is a sufficient safeguard. Not so in the bush where crimes of the kind that Wells committed are comparatively easy (to commit) ... the very peacefulness of the

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1. Swanwick had been a school teacher before becoming a barrister and, in 1875, had written a book on the need for better secondary education for girls. He was somewhat of a rebel and was disbarred in 1882 for unethical conduct.
general population renders them more liable to fall victims of the daring of a determined ruffian. They live in peace, resting safely under the protection of the law, which terrifies intending evildoers by the severity of the punishment it decrees against them. Tender-hearted men, shrinking from the infliction of the death penalty, may permit their emotions to overmaster their judgment. They forget this one life which hangs in the balance is weighed against the security of the whole community and the fate of the unknown number of evil-disposed men who are only retained by their fear of the consequences from imitating Well's crime. For such an action as this, the intentional shooting of a man during the commission of a robbery, the law decrees death. And rightly so. Of all violent crimes, this of armed brigandage is the one the sparsely settled districts are most liable to. We are convinced the Government will not be influenced by the local clamor, or confound it with any general expression of feeling by the community at large.

The Telegraph's comment was on similar lines:

"Legal punishment to be effective must be certain and unalterable ... by the outside public. The criminal should know that the punishment provided for the infraction of the law which he has violated is as certain and inexorable as fate. The chief aim of punishment is to deter others. ... Life and property must be protected and made secure. This is a fundamental of civilised life."

One of their correspondents went even further, stating that "Wells has been found guilty of one of the foulest deeds that can be committed in any civilised country. Depend upon it, the only way in a sparsely populated country like Queensland to save the ruthless transfer of our hard earnings

into the pockets of lazy scamps and murderers, is to allow
the law to take its course and make short work of them, and
thereby rid society of this foul excrescence."¹

In the face of this opposition, Dr. O'Doherty, who
had been one of the few to publicly express his disapproval
of Wells' crime being a capital one, turned a complete
somersault and told the Acting-Governor that: "He believed
that no punishment was too severe for the crime for which
Wells was convicted," but that, since he had not been defended,
he ought not to be hanged. Earlier, he had stated publicly
that "the Statute under which Wells was convicted was badly
worded and a disgrace to the Statute Books, and that he
promised to bring in an Act to repeal it on the first day of
Parliament."² Needless to say he took no such action.

Only Paddy O'Sullivan, M.L.A. was consistent in his
opposition to this crime being a capital one, and he alone
of the deputation that waited on Bell made any real impression
on that gentleman.³ O'Sullivan claimed that "it was better
to err on the side of mercy, and that a long term of imprisonment
was as great, if not a greater, deterrent as death"⁴ to the type

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1. A letter from "Subscriber" appearing in the Telegraph,
10/3/1880.


4. According to Bell's reply to the deputation - Courier,
22/3/1880.

of young thugs who tended to take up bushranging in Queensland. At the time of Miller's execution in 1879, he had expressed the hope that capital punishment might eventually be done away with completely.¹

The campaign closed, then, with the Government, the Brisbane press, and country people apparently still firmly convinced of the necessity for the retention of robbery under arms with wounding as a capital offence because of its alleged deterrent effect. However, a contrary view would seem to have been aroused in the minds of many Toowoomba and Brisbane residents. Rutledge too, despite his public statement to the contrary, would seem to have been deeply affected by Wells' execution. Although only a young barrister at the time, he joined with Garrick and Chubb in taking an appeal to the Full Court.² As the Attorney-General in the Dickson Government, it was Rutledge who, in 1899, introduced the Act (the Criminal Code Act) under which this offence ceased to be punishable with death.

ABOLITION

The Royal Commission on the Draft Criminal Code, in June, 1899, reported that it was of the unanimous opinion that


2. The appeal had been on whether the person robbed had to be the one who was wounded, but the Court held that the wording of the section clearly implied nothing of the kind. No appeal on the facts was permissible.
"the death penalty should no longer be inflicted where death of the wounded person does not ensue,"¹ and the Government accepted this recommendation when it introduced the Criminal Code Bill in September of that year. Given the "versatility" of Queensland criminal statistics, it would take a more confident person than the present writer to claim that Wells was the last man convicted of the crime in Queensland, but no mention of any such subsequent conviction has been found. Certainly Wells was the last man executed for the offence.

After reminiscing on the part he played in the Wells case, Rutledge told the House, "That is the state of the law and an amendment in that respect is greatly to be necessitated. ... I do not think a law which allows an occurrence of that kind should be perpetuated. A law which would apply to a condition of things when bushranging prevailed should not continue in the present time."²

**EFFECT AS A DETERRENT:**

Johnston suggests that "bushranging may have been kept low in Queensland by the high penal penalties"³ and while it would be foolish to deny the possibility of his being

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¹. _V&R_ First Session 1899, p. 292.
correct, the danger of allowing too much emphasis being placed on the "deterrent value" of the punishment should not be overlooked. Both Victoria and New South Wales had laws similar to that applying in Queensland, the New South Wales provision being even more severe, but bushranging continued to be fairly prevalent there until well towards the end of the last century. Again, the fact that only two men actually suffered under the provision in Queensland tends to weaken the view that it acted as a deterrent, for that which is not known can hardly deter. In 1830, both O'Doherty and Carrick claimed that Wells was the first person indicted under Section 44, and nobody, except Mr. Justice Lutwyche, who had tried a man under it at Maryborough, the man having been acquitted, contradicted this, which is surprising in view of William Brown's execution in 1870.

What this does show, however, is that few people were aware that Wells' was a capital offence. Certainly he did not know this at the time of the trial and several of the jurors, who later signed the petition in Toowoomba, said that, until the Chief Justice acquainted Wells with this, they too had been ignorant of the fact.\footnote{The \textit{Telegraph}, (9/3/1880) went to the other extreme and maintained that not only was Wells' offence capital, but so was shooting with intent to kill - one of the offences removed from the capital list in 1865. It was only when wounding was linked with an attack on property, irrespective of any intention to kill, that the supreme penalty was inflicted.} All this leads one to doubt if the
deterrent effect of Section 44 can be positively proved, and surely the onus should fall on those proclaiming this particular value of capital punishment. When human life is at stake, something more substantial than "a strong hunch" would seem to be required.

(b) PIRACY

According to International Law, every State has the right to apprehend, try, and, if convicted, punish any persons guilty of piracy jure gentium* "as an enemy of mankind;" the conduct of such trial and the nature of such punishment being determined by the laws of the given State. However, according to British Constitutional law, the Legislatures of "States" such as Queensland are not competent to pass legislation having an extra-territorial effect, unless such can be shown to be clearly necessary for the maintenance of public order and good government. There must be a sufficient link between the extra-territorial operation of the legislation and the interests of the "State" in question. Certain Imperial Acts dealing with piracy, however, have or had effect in Queensland. The only one of interest here, however, is the Piracy Act of 1837, of which Section 2 provides that, when piracy is accompanied by attempted murder, wounding, or violence dangerous to life, the punishment shall be death.


2. 7 Wm IV and 1 Vic. c 88.

* Note that piracy as defined by various Statutes is not necessarily identical with piracy jure gentium.
This Act has continued in force in Queensland, but the only case in which it seems to have been applied was in 1875, when Jimmy, an Aboriginal, was tried before Sheppard J. at Townsville on the charge of piracy and wounding with intent to murder upon the high seas. He was convicted, but successfully appealed to the Full Court. The offence had actually been committed "within an imaginary line drawn from one headland to another on the coast, and between the mainland and an island annexed by proclamation to Queensland". It was held that "the scene of the alleged piracy was within the body of the colony (and) the offence being a felony triable at common law, ... the prisoner is innocent at all events of piracy." The Attorney-General, Griffith, sought leave to appeal to the Privy Council, there being obiter in support of such an action in the case of the Magellan Pirates, but no order was made and the appeal does not seem to have been made.

Sections 31 and 32 of the Queensland Criminal Code provided that death should be the punishment for piracy, and attempted piracy, with personal violence, committed within the territorial jurisdiction of Queensland. This left unaltered the

1. Qld. Criminal Reports (1860-1907); R v Jimmy, p. 93.
the Imperial Statutes dealing with piracy on the high seas. When the bill reached the committee stage, Hardacre, not himself an abolitionist, attacked these provisions, claiming the crime was "only a crime against property on the high seas instead of the land."¹ "Surely" he argued "it was as dangerous to be stuck up in the lonely outback of the west as on the seas."² He was prepared, however, to accept that, "in extreme cases",³ piracy might warrant the supreme penalty. Rutledge's reply shows clearly that revenge and deterrence were still considered to be important aims of punishment, although one might be forgiven for expressing disappointment that the Attorney-General should not have been able to present his argument, whether one agrees with it or not, a little more intelligently.

"Men at sea", replied Rutledge, "do not have the same protection as those on land, (so there is) more need for a deterrence for piracy by having the death penalty ... a ship might be sailing along with very little wind, and a steam vessel containing pirates might come down on it, and it would not be able to do anything; but a man stuck up in the bush might be able to gallop away, or do something. The ship might have helpless women and children on board, and they might have their lives nearly terrified out of them. Would it not be a monstrous thing that any consideration should be shown to

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² Ibid.
³ Ibid.
to men who would do that sort of thing? He could not understand the honourable Member being anxious to show consideration to men who were no better than wild beasts."

Piracy ceased to be a capital offence under Queensland law in 1922, but such abolition had effect only with regard to piracy covered by the Criminal Code. So long, then, as the Imperial Piracy Act of 1837 remains in force, and it cannot be repealed by the Queensland Legislature, piracy with violence, committed on the high seas, is still a capital offence, and, if such pirates were tried and convicted in Queensland under this Act, the court would have no option but to sentence them to death.

(c) TREASON

The law of treason grew up by way of Statutes and cases in a rather complex and haphazard manner. In 1865, Fling declined to make any attempt to consolidate the law of treason, being content to say that "the law of treason is well defined by a number of cases, and it would be so hard to describe it that it scarcely would be possible to introduce it in any act." It is so well defined in England ... that I shall leave it to the judges here to decide cases of treason by those cases by which the law has been defined." Sir Samuel Griffith, however, being a more competent and certainly a more confident

2. "Well defined" indeed!
lawyer than Ring, had the courage to come to grips with the task and he reduced the hitherto formidable and often repetitive maze to one lengthy but lucid section\(^1\) in the Criminal Code.

In the Committee stage of the Criminal Code Bill, Dunsford moved to have the punishment for treason reduced to life imprisonment, "urging that the principal of a life for a life should be adhered to, and in such cases a conviction for murder could be had.\(^2\)" The motion was seconded by McDonnell. Foxton, who in the absence of Rutledge was in charge of the Bill, upheld the retention of treason as a capital offence on the ground that it was not simply a crime against a particular person but against the State itself, "since it might cause an upheaval of the country.\(^3\)"

Dalrymple thought the entire discussion rather pointless since he could see little chance of the law being applied in Queensland. To this, Joe Lesina, the sole advocate of the complete abolition of capital punishment in parliament at the time replied that, if it was to be inoperative, there could be no objection to its removal from the capital list. Lesina, as he had done in the Second Reading debate, again called into question the deterrent value of capital punishment, pointed to the fact that some 26 Kings, Queens, Czars, Shahs and Sultans had been assassinated that century by "political and social

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1. Section 37.
2. The Courier, 4/10/1999
3. Ibid.
fanatics', on whom the deterrent element of the punishment had apparently been lost. The amendment was, not unexpectedly, defeated without a division being pressed by the Labor members.

During the period of the Great War, members of the I.W.W. were convicted of treason in New South Wales. However, no instance of a treason trial ever taking place in Queensland has been found. Apart from a few snide remarks from the Opposition in 1922, that the "revolutionaries" in the Labor Party would welcome the removal of treason from the capital list, no special resistance was met in regard to its removal along with piracy, murder and wilful murder. In New South Wales both piracy with violence and treason have remained capital offences, despite murder ceasing to be so.

The Crimes Act.

Treason is defined slightly differently under Section 24(1) of the (Commonwealth) Crimes Act, 1914-1960 to that under the Queensland Criminal Code and the penalty prescribed is death. Commonwealth law is, of course, paramount over State law and a person convicted in Queensland under Section 24(1) of the Crimes Act would be "liable to the punishment of death". Section 24(4) of the Crimes Act makes special provision for such an occurrence; "A sentence of death passed by a court in pursuance of this section shall be carried into

1. Ibid.
execution ... if the law of the State or Territory\textsuperscript{1} (in which the offender is convicted) does not provide for the execution of sentences of death, in accordance with the directions of the Governor-General.\textsuperscript{2} Section 16 (1) of the Act states that, "subject to this Act, the penalty set out at the foot of any section or sub-section of this Act is the maximum which may be imposed ... but the Court ... may impose any lesser penalty if it thinks fit". It is submitted, however, that, in view of the different manner in which the penalty is specified in Section 24 (1), as compared with those in other sections of the Act, and the fact that the granting of the power to apply or withhold the death sentence to the Trial Judge would be an innovation into British criminal law,\textsuperscript{3} the death penalty is the mandatory sentence for treason under the Crimes Act.

So, as in the case of piracy with personal violence, it is still technically possible for a person convicted of treason in Queensland to be executed. It would be unlikely, however, given the absence here of the necessary equipment, that such executions would take place in Queensland itself. In the case of treason, it would be possible for the criminal to be transferred to one of the States "better prepared" for such a

\begin{itemize}
  \item[1.] The Queensland Criminal Code, with amendments, is in force in Papua-New Guinea.
  \item[2.] It is interesting to note that, in theory, the decision to execute is still one for the Queen's representative to make, not the Executive Council.
  \item[3.] Such is not impossible, but would not lightly be inferred. It would be reasonable to assume that such a radical departure from custom would, if intended, be expressed clearly in the Act.
\end{itemize}
task, but, in the case of conviction for piracy under the Imperial Act, it would seem that the Queensland Executive Council would be able to commute the death sentence to a suitable term of imprisonment. This was done, as we shall see later, in the case of the "Hopeful" prisoners, Williams and McNeil, who were convicted under an Imperial Statute for murder on the high seas in 1884.
Early opinions on punishment for rape

Prior to 1865, rape, unlawful carnal knowledge of a girl under ten, bestiality, and sodomy were capital offences in Queensland. However, with the passing of the Offences Against the Person Act in that year, rape came to be the only sexual offence visited with the extreme penalty. In practice there had been no executions for these other offences and they had, along with rape, ceased to be capital offences in Britain some time prior to Queensland’s separation from New South Wales. However, despite the fact that rape was, in effect, the only capital offence of a sexual nature in Queensland, it has been considered inadvisable to deal with the attitudes of the various governments, judges, juries, and the population of the colony in general, solely in regard to rape, since such is simply an extension of the general, rather vindictive, attitudes exhibited towards all offenders against the person of females. Thus, a consideration of the punishments at various times advocated for those committing less "serious" sexual offences will from time to time be undertaken.

In August 1860, the Queensland Government was presented with the opportunity of being the first of the Australian colonial governments to remove rape from the list of capital offences when C.W. Blakeney, M.L.A., (a prominent Brisbane
barrister and later a judge in the District Court) sought leave of the Legislative Assembly to introduce a Bill to this effect. His chief argument in favour of the Bill were that such was the law in England, where the abolition had not led to an increase in the crime, and that it "was an offence, which above all others, was most easily proved and most difficult to disprove." He concluded with a claim that: "There was an abundance of evidence on record to show that many an innocent man had been convicted and executed on the evidence of one designing woman."  

Exactly who was to be the seconder of the bill is uncertain. It may have been Lilley or O'Sullivan, who were both absent from the House that day but it most certainly was not Buckley who in fact did second the motion, but who emphasised that he did so only in order that Blakeney might be able, in the absence of the intended seconder, to proceed with his bill. In all, seven members, apart from Blakeney, spoke on the motion and all opposed the reform sought, on the grounds that the sparseness of the population, the isolation of women in country areas, and the presence of a large number of Aboriginals, made it imperative that there

1. It had been abolished there as a capital offence in 1841.
4. Gore, Buckley, Jordan, Watts, Taylor, Ring and Herbert.
should be no relaxation in the punishment for rape. Gore, in particular, thought that Aboriginals "could not be deterred by any other punishment than that of death," while Jordan, who was prepared to grant leave to introduce the bill, in order that the question of capital punishment, to which he claimed to be opposed, might be more fully discussed, thought that "if capital punishment was to be enforced in any case, it ought to be enforced in the case of rape, which was even worse than murder."2

Perhaps of more importance are the opinions on the matter expressed by the Colonial Secretary and the Attorney-General (Herbert and Pring), since they were to play quite prominent parts in Queensland politics in subsequent years. Pring, as we have already seen, was Attorney-General as late as 1860. Herbert put the Government's view thus:

"In the outlaying districts, a large portion of the population is not European and where the facilities for crime were unusually great the punishment of death for rape could not at present be dispensed with. The intention of the Executive in all cases of this kind is to exercise a vigilant discretion, and as far as might be consistent with the nature of the crime and the circumstances surrounding it to apply the prerogative of mercy."3

While agreeing that, in deciding whether to execute or not, the Executive would "exercise a proper discretion" Pring asked "whether death was too great a punishment for any

man who could deliberately contaminate and perhaps ruin a child for life, in order to gratify a merely lustful desire? He maintained that a child so treated would be better off dead, and that so long as capital punishment was retained he would enforce it in cases of that kind. (Hear, hear)\(^1\)

The bill, with leave of the House, was withdrawn.

When the Offences Against the Person Bill was introduced into Parliament in 1865, the second reading speeches by Pring and Bramston, M.L.C., were such as to indicate that there had been no appreciable change in attitude by the Government in this regard, while the absence of criticism or comment on the part of the members generally, with exception of R.J. Smith (already referred to), showed general approval for continuation of rape as a capital offence. As well as the sexual offences previously mentioned, death ceased to be a punishment for setting fire to a dwelling house (people within being put to fear), administering poison with intent to kill, and wounding with intent to kill. The reason advanced by Bramston for withdrawing cases of attempted murder from the capital list was "to save a man from the commission of the greater offence (i.e. murder) to which he might be led from feeling that the punishment is the same for the lesser crime"\(^2\) (e.g. assault with intent to kill). That similar reasoning could have been advanced (and was advanced

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in the 1890's) in favour of rape also ceasing to be a capital offence, for fear that the rapist, already facing a capital charge, might be induced to kill his victim and remove the chief, if not only, witness to the crime, seems rather obvious. Whether this further application of the argument was overlooked or merely outweighed by those advanced in favour of the retention of hanging as the punishment for rape is uncertain. But certainly the Government spokesmen Pring and Bramston gave no indication that such had even been considered in regard to rape.

"Capital punishment will be kept for rape", said Bramston, "because the women in this colony are in a more defenceless position than at home, from our limited population and scattered habitation, and, consequently they are very liable to violence in the absence of their natural protectors; and they are also liable to assaults by the Aboriginals. For the Aboriginals, I believe, hanging is the only thing that brings home to them the terror of the law." 1

The Government's policy was thus seemingly unaltered from what it had been in 1860. Even Smith, M.L.C., like Blakeney in 1860, was not so much concerned that rape should be a capital offence, but that it was an offence too easily proved. The impression one is left with is that, if there were no doubt as

to a rapist's guilt, then they had no real objection to his being hanged. Thus, Smith argued that something more than the evidence of a married woman should be required before a verdict of "guilty" could be returned,¹ while "the case of a young girl, where medical testimony established the fact that a crime had been committed, was different."² Proof of rape, however, was not made more difficult but rather slightly easier, in that all that was to be required as proof of carnal knowledge was penetration, and not emission, as had been the case previously.³

Before leaving the 1865 Act, it is worth noting the amendments passed by the Legislative Council, which provided for whippings, as many as three in the case of unlawful carnal knowledge of a girl under ten, to be made part of the punishment which the judge could inflict on those convicted of sexual offences less than rape, even though imprisonment for life, on occasions, could also be inflicted.

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1. The exact requirements and implications of corroborative evidence and a "fresh complaint" in rape cases (in Queensland) were not really established until the early 1960s when the late Sir Roslyn Philip J. played a leading role in clarifying the law as regards these matters. E.g. R.V. Hinton (1961) St. R. Qd. 17.


3. But once penetration had been proved emission was presumed to have followed unless there was evidence to indicate that emission had not in fact followed penetration.
The chief advocates for corporal punishment were Gore (who had been called to the Legislative Council in 1863), Fitz and Wood, who despite opposition from Bramston and Smith, had little difficulty in persuading the House that "when men forget themselves and become brutes ... they placed themselves without the pale of society; they deserved brutal treatment."¹ The amendments, except as regards to attempted unlawful carnal knowledge of a girl between ten and twelve, were accepted by the Legislative Assembly. Although this Act dealt only with offences against the person, it should be remembered, so that a proper perspective of the punishment for sexual offences might be maintained, that whipping could also form part of the punishment for certain crimes against property, such as arson and attempting to derail trains, as well. Such remained the law until the passing of the Criminal Code.

Application of the Law.

After noting the rejection of Blakeney's Bill in 1860, Lincoln concluded that "in practice the law as regards rape was interpreted flexibly ... the only prisoners executed (for rape) would seem to have been Aborigina尔斯", and supported this by the facts that only two men were executed for rape during 1861-1862 and that a man charged with rape at Ipswich in September 1860 had his charge reduced to indecent assault, for which he received two years with hard labour, when his

offence "was clearly rape".\(^1\) With respect, it is submitted that Lincoln’s supporting evidence is not strictly accurate, albeit his conclusions appear to be sound.\(^2\)

In order to ascertain whether the law as regards rape was "interpreted flexibly," it will be necessary to consider:

1. Whether the police and/or the Crown Prosecutors tended to prosecute for offences less than rape, when the evidence pointed to rape;

2. Whether the Executive Council regularly exercised the prerogative of mercy to those convicted of rape;

and

3. Whether juries were reluctant to convict for rape, knowing that the punishment would be death.

This last factor is of course closely linked to the exercise of the prerogative of mercy, since, if it were almost certain that the death penalty would not be carried out, there would be less reason for reluctance to convict on the part of the jury.

With regard to the first factor for consideration, it is impossible to discover the number of times the Crown pressed only the lesser charges, but there is some reason for

1. Ibid.

2. It should be remembered that the subsequent analysis is based, as has already been mentioned, on relatively questionable statistics.
believing, having regard to the few white men charged with rape, as compared with Aborigines and, later, Kanakas, that such may well have been the practice. The instance given by Lincoln, however, would not appear to be an example of such; firstly, because the lessening of the charge was not made until most of the Crown's case had been presented, thus tending to indicate that the reduction resulted from the discovery by the Crown Prosecutor of insufficient evidence; secondly, because the charge was reduced not to unlawful carnal knowledge but to indecent assault, thus tending to show that the lack of evidence was on the question of carnal knowledge, not consent (remembering that, in 1860, both penetration and emission had to be proved to establish carnal knowledge); thirdly, that, from the newspaper reports, there was certainly no clear evidence even of penetration; and finally, that, had it been the policy not to press rape charges, a conviction for such would not have been originally sought in open court. If such was the practice it seems reasonable to assume that it would not have been done in as open a manner as Lincoln suggests.

As regards to the exercise of the prerogative of mercy,

1. This absence could have been due to a reluctance to mention such matters in the public press, but it could have been due equally to an absence of such evidence. It is for those claiming that the case was "clearly rape" to show the presence of this element.
the fact that only two men (actually only one, the other being shot while trying to escape) were executed during 1861-1862 does not show that the prerogative was liberally exercised, since there were only three convictions for rape during this period. More detailed information in this regard may be found in the table and graphs in Appendix 1, a summary of which will now be given. In the 15 years from 1860-1874 inclusive, of the 11 men who were convicted of rape seven were executed, one shot while attempting to escape, one was pardoned because of insufficient evidence, and two had their sentences commuted. A comparison between these figures and those for murder shows that of two men, one convicted of rape and the other of murder, the chance of the rapist having his sentence commuted was only half that of the murderer's.

<table>
<thead>
<tr>
<th>Offence</th>
<th>Convicted</th>
<th>Acquitted 1</th>
<th>Executed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape</td>
<td>11</td>
<td>19</td>
<td>7</td>
</tr>
<tr>
<td>Murder</td>
<td>21</td>
<td>21</td>
<td>13</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Executed after conviction</th>
<th>Committed after conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape 63.6%</td>
<td>Rape 13.2%</td>
</tr>
<tr>
<td>Murder 61.9%</td>
<td>Murder 33.1%</td>
</tr>
</tbody>
</table>

1. As previously explained this means acquitted of the offence charged (i.e. rape or murder) irrespective of any subsequent conviction for a lesser offence (e.g. indecent assault or manslaughter).
If the rapist shot is included in the list of those executed and the man pardoned in those acquitted, the percentage of convicted rapists hanged is then 30%. Indeed, the only commutations of the death sentence for rape occurred during Herbert's first Ministry, although some subsequent Ministries, such as Macalister's first two, had no such opportunities, there being no convictions for rape during their term of office.

There would, in comparison with the figures given for murder, seem to be some reluctance on the part of juries to convict for rape, with the conviction rate being 37% of those actually tried for the offence\(^1\) up to 1874\(^2\), as compared with 50% for murder. But the figures are very small and, apart from the year 1860 and 1866 there is no great disproportion between convictions and acquittals for rape. As yet then, it would be difficult to support the contention that the law as regards to rape was "interpreted flexibly", but the picture alters somewhat when the racial element is introduced.

1. This figure ignores cases where No True Bill was lodged or where, for some other reason (e.g. insanity) the charge was not tried.

2. The year 1874 was chosen as the end of the period for examination, because, in the three subsequent years, the figures are inflated by the combination in the one statistic of trials for the non-capital offence of unlawful carnal knowledge with those for rape. The figures for 1874-1883 indicate that the pattern remained the same after 1874 as it had been before.
Aboriginals and the Law:

All seven men hanged for rape before 1875 were Aboriginals who had committed the offence on a white woman, as was the convict shot and the one pardoned. Unfortunately, it has not been possible to discover the racial origin of the two rapists whose sentences were commuted in 1864 and 1865, but, given the attitude of Pring and Bramston who were the Attorneys-General for most of this period, it would not be surprising if they were Europeans. If they were, it would indicate an extremely "flexible" interpretation of the law by the Government; if they were not, it would mean that no European was convicted or raped prior to 1875, giving evidence of a reluctance by juries to convict Europeans.1 In either case, the proposition that Europeans were not, as a general rule, charged with rape, is given some additional support, since at least nine of the 30 tried for rape in this period were Aboriginals. This racial bias in the conviction and execution rates continued after 1874, with Kanakas coming in for a disproportionate share in the number of convictions, if not of executions. It may, of course, be that coloured people are more likely to commit sexual offences than Europeans - such would explain the high

1. Certainly one of the three tried for rape in 1865 was white (a magistrate at Roma in fact), but whether he was the one convicted but not hanged or one of the two acquitted has not been ascertained positively. The matter was hurriedly "hushed up" and the question regarding the matter asked in the Legislative Assembly was allowed to remain unanswered.
conviction rate - but the disproportion is so great that, allowing that white men are slightly less than angels, it is difficult not to conclude that this explanation is not wholly adequate.

Table 4.

<table>
<thead>
<tr>
<th></th>
<th>Aboriginales</th>
<th>Kanakas</th>
<th>Europeans</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10</td>
<td>3</td>
<td>1</td>
<td>14</td>
</tr>
</tbody>
</table>

That there should have been little expression of regret at executing Aboriginales for rape is not really too surprising given the feeling, current in the colony at least until 1884 when the "Hopeful" prisoners were convicted, and probably until 1889 when they were all released from jail, that the taking of the life of a coloured man by a European was not really a serious crime at all. This racial arrogance, if not hatred, which was originally directed against the Aboriginal was later, on the part of the poorer whites, directed against Kanakas and Chinese, who were feared as economic threats since they were prepared to work for long hours at low pay. Evidence supporting the proposition that Aboriginales did not receive equal treatment with whites before the law is given by O'Sullivan\(^1\) and Johnston\(^2\).

Speaking of a complaint made to him, against a white man, by the man's Aboriginal mistress, who alleged he had beaten her and had killed both of their children shortly after birth, Police Sergeant O'Sullivan regretfully concluded:

"There was only the entirely uncorroborated statements (except for the fact, as he admits, that she had obviously been ruthlessly beaten) of an aborigine, who was prompted by a desire for revenge, and no jury would convict a man of murder in such circumstances."¹

What he should have said was "white man", for, in the same year (1883), an Aboriginal was convicted, "on circumstantial evidence ... and the uncertain identification by a 59 year old woman",² and executed for rape. Johnston tells of the extreme reluctance of a jury at Normanton to acquit a "young Aboriginal boy charged with assaulting a white woman of bullocky proportions and temperament",³ despite Mr. Justice Cooper's instructing them to bring in a verdict of "not guilty".

This is not to say that judges were a party to this form of discrimination against Aboriginals. Stern judges like Cooper and Harding J.J. were severe on black and white offenders alike, the former sentencing Camm, a white man convicted of having unlawful carnal knowledge of an Aboriginal

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¹ O'Sullivan, op. cit. pp. 33-4.
² Ibid., p. 56.
³ Johnston, op. cit. p.130.
girl under ten, to life imprisonment, the maximum discretionary punishment available, except for the addition of one or more whippings.

More lenient judges, such as Heal J., took account of the inadequacy, or even complete absence, of moral and religious education had by aboriginals. Thus, in dealing with an Aboriginal convicted of attempted rape in 1892, Heal J. said:

"I have a most painful duty to perform in dealing with this case. Here we have an untutored savage who knows nothing about God or religion. He has never been taught self-restraint. His feelings were too strong for him and he gave way to them. On the other hand there was this woman wandering about the bush alone, putting temptation in his way, which he could not resist. This should be a warning to other women. The sentence of the Court is that he be imprisoned for six months, and, as I notice he has been in goal for over two months awaiting trial, that is to be counted as part of his sentence. Therefore, he will serve four months."1

The sad irony is that, less than a year later, the same Aboriginal was convicted for rape and duly hanged.

Criticism in the district where the crimes were committed (St. George) was loud against Heal J.'s original show of well-intended clemency.

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1. Her age was not definitely determined, but Cooper J. allowed the evidence of two doctors, based on the condition of her teeth, that it was somewhere between five and seven as sufficient for a verdict by the jury. This was, perhaps, a case where the charge should have been rape.

R v Byrne - the turning point?

In March, 1882, George Byrne went on trial in Brisbane before Harding J. charged with raping a servant girl of 16. He was defended by P. Swanwick, and Pope Cooper, the Attorney-General, represented the Crown. It would be out of place here to undertake an investigation of the reasons, one suspects both political and personal as well as circumstantial, which caused the unprecedented clash between Harding J. and Swanwick and, to a lesser extent, between Cooper and Swanwick. The trouble began with a request by Swanwick for an adjournment while a defence witness was brought from Cooktown and ended with Swanwick’s refusal to continue cross-examination, to address the jury, or to argue *viva voce* the points he wished referred to the Full Court. The defence witness was not located prior to the conclusion of the somewhat truncated trial and Byrne was sentenced to death. Swanwick failed to appear before the Full Court for the hearing of the appeal, which was automatically dismissed, and he was suspended from practice because of his misconduct.¹ Throughout April and May, the fact that Byrne lay under sentence of death appeared to have been forgotten by the press and public, due,

1. He was not disbarred on this occasion - that was to happen less than a year later.
no doubt, to the publicity of Swanwick's clash with the Judiciary. When he finally apologised to the Court on May 9th, he attempted to justify the stand he had taken during the trial by referring to "certain circumstances that have transpired" since the trial as regards the relevance of the evidence of the missing witness, but was prevented from continuing by the Chief Justice (Lilley) since "it was not desirable that it should be made public, as the matter was still sub judice".

It would appear, then, that the Executive Council obtained the missing evidence and weighed it against that adduced at the trial, all in private however, before deciding that the law should take its course. Although there is no real evidence in support of this proposition, it would not be unreasonable to suggest that the decision to execute was influenced by the fact that, to have adopted any other course, would have been to cast a doubt on the trial judge's conduct in refusing a postponement of the trial. It is not suggested that an innocent man was hanged, but rather that, had his trial been a normal one, Byrne may not have been the first (and only) European to be hanged in Queensland for rape.

3. He was executed some 60 days after being sentenced, and 49 days after the dismissal of his appeal, although he was in Brisbane jail throughout.
Whatever the reason for the Executive Council's decision, there followed almost immediately from this time a marked decrease in the conviction rate for rape. Apart from the Aboriginal executed in 1883 (already referred to) there was no further convictions for rape until 1887, while there were 13 acquittals.

In 1887 there were two convictions for rape; one an American negro who fasted to death in jail, and the other the German, Müller, whose sentence was commuted by Governor Musgrave contrary to wishes of the majority of the Griffith Government. Apart from the criticism of the Courier already mentioned, there was no reaction against the commutation of the sentence. It may well be that the Governor had recognised the general feeling of the public, as evidenced by the reluctance of juries to convict for rape since Byrne's execution, against the retention of rape as a capital offence. However that may be, following this strong indication that rapists would not automatically be hanged, the conviction rate increased rapidly until 1893, with seven of the 10 tried being convicted, as compared with the 13 consecutive acquittals prior to 1887.

1. The Editor at the time was Carl A. Feilberg.
2. In June, 1887, a letter appeared in the Courier 13/6/1887 from N. Bartley, a regular correspondent, advocating that, whenever there was an acquittal for rape, the woman should automatically be tried for perjury and attempted murder. What he failed to see was that such a law would almost certainly ensure the conviction of all men tried for rape.
In May 1839, three Kanakas convicted of raping a Kanaka woman had their sentences reduced to three years imprisonment each and when, in June the same year, the Executive decided to execute another Kanaka, who had raped a white woman, the Courier, M.B. Gannon, M.I.A., (who was extremely interested in the question of severe sentences, as was evidenced by his concern for the "Hopeful" prisoners in 1839, the "Strike" prisoners in 1831, a man given 20 years for arson, and two men serving life sentences for manslaughter), and an anonymous correspondent to the Courier were quick to point to the inconsistency between the two cases. The Courier reinforced the inference drawn from the statistics when it said:

"There is no getting away from the instinctive feeling - that the crowning offence against society is murder, and that, serious as sexual offences are, they must yet in point of criminality and punishment, take a secondary place ... the public has of late years demanded more decidedly than ever that the murderer shall die, while at the same time it has, with scarcely less distinctness and emphasis, declared that death should NOT attach to any crime short of murder. The reluctance exhibited by juries to convict of so-called capital offences against women, the readiness with which of late the capital sentence has in such cases been commuted, and the consequent rarity of executions as compared with the offence itself, all go to show that public sentiment is opposed to the infliction of the extreme penalty of the law for such a crime".1

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It also pointed to the condemned man's ignorance of British law and our moral code, while one of their correspondents bluntly asserted:

"In my own mind, I have no doubt, if the offence had been committed by a white man, the Executive would have been petitioned for a remission of the sentence. Because he is black and without friends is no reason to hang him."\(^1\)

Gannon's chief complaint was that the jury's recommendation to mercy had been dismissed by the Executive Council, and he feared that such action might cause juries to return verdicts of "not guilty" rather than risk that their pleas for mercy would be ignored. Both Premier Morehead and Opposition Leader Griffiths rejected the contention that the Executive was bound by the jury's recommendation, but, on June 12th, the Executive Council commuted the sentence to life imprisonment.

The last execution for rape took place in 1892, and although there was no evidence of public discontent at this, the criminal's past record, together with the mercy already exercised on his behalf by Heal J., and the "nature of the crime (which) has precluded the publication of the details of the case",\(^2\) all tended to reduce the possibility of a widespread show of public sentiment. There had also been a change in the editorship of the Courier with E.J.T. Barton

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replacing W. Kinnard Rose,¹ who had been favourable to the removal of rape from the capital list in 1889. But even the execution of this Aboriginal would appear to have again brought about a reluctance on the part of the juries to convict for rape, for, during the next five years, only two of the 13 tried for rape were convicted.

The Criminal Code, a test of public opinion, and abolition

In November, 1897, Griffith finished his mammoth task of preparing a Draft Criminal Code for Queensland, but, although he had introduced certain alterations into the criminal law, he had left the punishment for rape unaltered. On December 3rd, 1897, the Executive decided that the recently convicted rapist, Smith, should be executed on the 13th December, while the murderer, Wherrel, had his sentence commuted. It appears that this decision was almost certainly taken so that a test could be made of the public's attitude as to whether rape should continue to be a capital offence.

In less than a week following the announcement of the Executive's decision, the Courier received and published 23 letters on the subject,² of which 20 favoured,

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1. He had been a lawyer in Scotland and the Griffith Government had appointed him to investigate Queensland's prison system in 1887. He had previously been on the Committee enquiring into the circumstances of the crimes of the "Hopeful" prisoners.

2. It was stated by the Courier (10/12/1897) that many other letters had been received but that, in view of the Executive's action in commutating the sentence, they would not be published.
for various reasons,¹ a commutation of the sentence — 13 of them expressly protesting against rape still being a capital offence. Most argued on the basis that capital punishment could only be justified on the principle of a "life for a life", but the sounder reason, that rapists would be induced to kill their victims, was also advanced by two correspondents. The Courier, although favouring a commutation in the case at hand,² expressly refrained from advocating that rape should cease to be a capital offence, but suggested that "at some time in the future when the law can be dispassionately discussed"³ the matter might well be considered by Parliament.

A public meeting in favour of a commutation of the sentence was held at Mr. Gannon's office and prominent men, such as Ruthning (a solicitor), Bentley, Bond, J.P., and G.D. Russell, spoke. A telegram of encouragement and support was received from Beenleigh, signed by 13 of the town's most prominent business and professional men.

[See Appendix 2].

Early in 1899, the Draft Criminal Code was studied by a Royal Commission of all the Supreme and District

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1. e.g. his youth, his lack of education, his being undefended at his trial, that there was no permanent injury done to the little girl, lack of premeditation, as well as opposition to rape being a capital offence.

2. The chief reason being that the death sentence should only be inflicted in the most serious or brutal types of capital offences, as when murder was premeditated, or when the victim of a rape contracted some disease or was brutally and/or outrageously assaulted by the rapist.

3. Courier, 9/12/1897.
Court Judges (except for Cooper J. who was absent from the Colony) and the Crown Prosecutors. With only Griffith C.J. and Chubb J. (the Northern Judge) dissenting, a recommendation was made that rape should cease to be a capital offence. The two dissentients opposed the change, "being of the opinion that the circumstances of some parts of the colony (did) not yet warrant (it)". If they had the Northern part of the colony in mind, the statistics would not seem to support this conservative approach, since there had been but three convictions and 11 trials for rape before either the Northern Supreme or District Courts (including circuit courts) in the preceding ten years.

Table 5.

<table>
<thead>
<tr>
<th>Year</th>
<th>Convictions North. Whole colony</th>
<th>Acquittals North. Whole colony</th>
<th>Total Tried North. Whole Colony</th>
</tr>
</thead>
<tbody>
<tr>
<td>1889</td>
<td>1</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>1890</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1891</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1892</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1893</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1894</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1895</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1896</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1897</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1898</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

Totals 3 10 3 15 11 25

Convictions in North = 30% of total convictions
Trials in North = 44% of total trials

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When these percentages are compared with the equivalents for murder (33.7% of all murder convictions and 53.2% of all murder trials took place in the North) it is seen that they are of even less cause for concern.

The Royal Commission's recommendation was accepted by the Government and Parliament and Attorney-General Rutledge told the Legislative Assembly that he had always believed that rape ought not to be a capital offence. Indeed, it would seem that there had never been an execution for rape while Rutledge was Attorney-General. He would almost certainly have been among the minority of the 1887 Cabinet, which agreed with Governor Musgrave's commutation of Müller's sentence. The Criminal Code did not become operative until 1901, and during this "twilight" period, a man was convicted for rape. Mr. Acting Justice Noel, however, declined to pronounce the death sentence on him and ordered that it should be recorded instead. There was never any real doubt that the sentence would be commuted. The fact that few instances\(^1\) of Judges recording the sentence in previous rape cases have been found would seem to indicate that they had been content that rape should remain a capital offence. This being the case, the clearly expressed opinion of the people (of Brisbane and surrounding districts at least) in

\(^1\) One such was the 1887 case of the Kanakas charged with raping a Kanaka woman.
1397 would appear to have exorcised some influence on them, sufficient at least to cause the Royal Commission's recommendation in mid-1399.

**CORPORAL PUNISHMENT**

Although, as we have seen, there was a gradual alteration in the idea of what the punishment for rape ought to be, there was, if anything, an extension in the use of corporal punishment against sexual offenders. Sir Charles Lilley had considered that whipping acted as powerful deterrent to such offenders, and in 1391 whipping was made part of the punishment for boys under 16 who committed any offence against the person. Under the Criminal Code, however, whipping was abolished for all offences except garroting and offences against young females, and was to be administered only once for any such offence, although most Labor members advocated the complete abolition of corporal punishment. In this they were given vocal support in the Upper House by Morehead, but the general opinion continued to maintain that "whipping was too good for some sexual offenders".

A brief look at the position in England is sufficient to show how backward Queensland was as regards the infliction of corporal punishment. In 1320, the whipping of females had been prohibited, and in 1862

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1. Higgins conceded that corporal punishment was necessary in extreme cases, while Kidston, although opposing whippings, advocated castration for serious sexual offenders.
offenders under 14 were to be given no more than 12 strokes with a birch rod, and no offender was to be whipped more than once for the same offense. In Scotland, no offender above 16 could be whipped for a crime against person or property after 1862.

Conclusion

One curious aspect as regards the punishment of sexual offenders was the extreme reluctance, exhibited chiefly by members of the Legislative Council, to raise the age of consent, despite the strenuous efforts of the I.W.C.A. The reason given in 1891 for not raising the age to 16 (it was in fact increased from 12 to 14) was to protect young men from servant girls. The need to protect rich young men was considered greater than for poor young girls by the vast majority of the members of both Houses of Parliament. The position was maintained by the Criminal Code which also provided that a girl of property, or an heiress under 21 could not dispose of her property by marriage, and imposed severe punishment on any man

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1. The Whipping Act, 1862.

2. There had been an earlier attempt to raise the age of consent above that of 12 years, but it had failed completely.
marrying her (even though she had been a willing party)\(^1\)
because, as Rutledge told the House:

\[\begin{align*}
&"\text{I do not regard a woman under 21 as} \\
&\text{having the capacity to dispose of her} \\
&\text{property."} \quad \text{To this, Givens replied} \\
&\text{"he noticed the law made provisions} \\
&\text{for a girl giving consent to the disposal} \\
&\text{of her body at a much younger age."} \quad \text{\(3\)}
\end{align*}\]

Despite the harshness of the punishments metered out to
sexual offenders and the contempt in which they were
apparently held, it would seem that there was, after all,
something, apart from life itself, more important than
a woman's honour in nineteenth century Queensland.

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1. Rutledge agreed to reduce the maximum sentence

   that a judge could impose for this offence from

   14 to seven years. Lesina thought that the most

   fitting punishment would be to make the man live

   with the girl.


3. Ibid.
CHAPTER 4.
"General Attitudes to Capital Punishment in Nineteenth Century Queensland."

Shifts in Emphasis.

As has already been seen, the 40 years from separation to the passing of the Criminal Code Act saw a gradual change taking place in Queensland in the idea of what the desired scope of the application of capital punishment to offences other than murder should be. But this change did not strike at the more basic question of the acceptance or rejection of capital punishment. There was indeed general approval for its retention for murder, and all that was questioned was the extent of its application to the various types of homicide and the various classes of offenders. ¹

Although a discussion of the aims of punishment in general is outside the scope of this work, it may be helpful, in order to better understand the changing attitudes with regard to capital punishment, to briefly outline what they may be considered to be. Punishment may contain any or all of the following elements.

1. Revenge - by society on the offender against its standards;

2. Deterrence - (a) aimed at the particular law-breaker, or

1. E.g. women, youths, and coloured aliens.
(b) aimed at all potential law-breakers - an example being made of the particular offender in an attempt to enforce the law through terror;

3. Just Retribution - the first two elements being tempered to suit the circumstances of the particular case; and

4. Reformation - aimed at returning the criminal to society so that he may play a useful part in it.

The period covered by this chapter witnessed a gradual shift from "revenge" (seen particularly in cases of sexual offences by Aboriginals) through to "just retribution", although clear lines of demarcation are absent - the change being one of emphasis only. The elements themselves, indeed, overlap greatly, and may all be said to find their basis in the desire to protect society. Only the last mentioned element, "reformation", is incompatible with capital punishment; but, although it was of some relevance to a consideration of the aim of punishment towards the end of the century, the inconsistency was removed by virtue of the fact that criminals thought to be deserving of capital punishment were considered as "beyond reform".

1. Strictly speaking, it is almost impossible at times to distinguish between these notions of the purpose of punishment. In the case of rape, the fact that only Aboriginals were hanged until 1882, supports the claim that revenge was the chief motive of punishment. But the deterrent aspect was still of some consequence. In the case of armed bushranging, deterrence was probably paramount, although the attitudes exhibited by correspondents to the Telegraph in 1880 also showed the feelings of revenge harboured towards these offenders against property.
Together with the above mentioned alteration in the idea of the purpose of punishment there came a slight relaxation in the actual application of capital punishment. At first, especially for crimes which aroused the desire for revenge, it was only rarely that a death sentence was commutated. This claim is supported by the high execution rate, as compared with convictions, for rape, especially when, as was generally the case, the offender was an aboriginal, but is also true for murder (see Table 6) although the deterrent aspect was probably of chief concern in such cases.——

<table>
<thead>
<tr>
<th>Years</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>Executions</th>
<th>Executions as per centage of convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1860-4</td>
<td>10</td>
<td>7</td>
<td>3</td>
<td>30%</td>
</tr>
<tr>
<td>1865-9</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>100%</td>
</tr>
<tr>
<td>1870-4</td>
<td>6</td>
<td>9</td>
<td>5</td>
<td>83.3%</td>
</tr>
<tr>
<td>1875-9</td>
<td>7</td>
<td>17</td>
<td>5</td>
<td>71.4%</td>
</tr>
<tr>
<td>1880-4</td>
<td>11</td>
<td>12</td>
<td>7¹</td>
<td>63.6%¹</td>
</tr>
</tbody>
</table>

**TOTAL**

| (1860-84) | 39          | 51         | 25¹        | 64.1%¹                                |

| (1865-84) | 29          | 44         | 22²        | 75.9%²                                |

1. If it had not been for the large public outcry over the "Hopeful" prisoners, these figures would certainly have been 9, 81.8%, 27 and 69.2% respectively.

2. On the same basis these would be 24 and 82.8% respectively.
The leniency of the 1860-4 period, when the commutation percentage for murder was 70% as compared to 25% for rape, is not inconsistent with this proposition, since it supports the claim that less vengeance, in general, was sought against the murderer than the rapist. However, the high number of convictions for murder (10) in this period may well have caused a "toughening up" on executions for murder, in order to attempt to deter commission of the offence. That this may have become too severe is indicated by the increase in the proportion of acquittals after 1865, when the death penalty was carried out more rigorously. Following the 1865-70 period in which 90.9% of those convicted of murder were hanged, the conviction rate fell to 29.2% in the 1875-9 period, whereas it had been 58.8%, 41.8%, and 40% respectively, in the three preceding five-year periods.

Table 7  
MURDERS.

<table>
<thead>
<tr>
<th>Years</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>Executions</th>
<th>Executions as percentages of convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1885-9</td>
<td>18</td>
<td>30</td>
<td>8</td>
<td>44.4%</td>
</tr>
<tr>
<td>1890-4</td>
<td>17</td>
<td>48</td>
<td>6</td>
<td>35.3%</td>
</tr>
<tr>
<td>1895-99</td>
<td>27</td>
<td>26</td>
<td>5</td>
<td>18.5%</td>
</tr>
<tr>
<td>TOTALS</td>
<td>62</td>
<td>113</td>
<td>19</td>
<td>30.6%</td>
</tr>
</tbody>
</table>

Following the aroused public feeling in favour of the commutation of McNeil and Williams in 1884, there was quite a rapid reduction in both the proportion of convictions to trials and executions to convictions (compare Table 6 with Table 7). During the four years preceding the passing of the Criminal Code,
however, there were no executions at all, and the conviction rate increased. If only the four years 1886-9 are considered the rate is 55.2%. During the 1860-1864 period it had been 58.8%, but this figure had never been even closely approached in subsequent years until this 1896-9 period. This would seem to support the proposition that juries are reluctant to convict in capital cases. Although, if asked in the abstract, as individual members of the public, people may say that they favour the retention of capital punishment, and this would seem almost certainly to have been the case in nineteenth century Queensland, though no such opinion poll was, of course, taken, it seems that, when they have the responsibility of deciding whether the death sentence should be passed or not, they are unwilling to convict in any but the most clearly proven, or most brutal or cold-blooded cases. Such at least is indicated by the statistics (such as they are) regarding murder trials in nineteenth century Queensland.  

The rapid fall in the execution rate following 1884  

1. But whether the truth of this argument actually supports those advocating the abolition of capital punishment is another matter, since it may be argued that abolition may lead juries to convict on quite meagre evidence. Verdicts on the "balance of probabilities" may be more common when the consequence of convicting the innocent are less severe and less irrepairable.
may be explained by the fact that the agitation that year, although based primarily on feelings of racial superiority, did arouse an awareness that the punishment for murder should be altered, when necessary, to suit the circumstances of the particular crime. This aspect found its effect both on the public generally, and on the two coalitions or parties predominating the political life of Queensland at the time: the McIlwraith-Morehead group because its members and supporters had been the prime instigators of the 1884 agitation, and the Griffith group because of the tremendous loss it suffered at the 1888 general elections, due chiefly to the stand it had taken against those seeking commutation of the two sentences. The agitation would also have given the few exponents of the abolition of capital punishment an opportunity of expressing their views in public, without having the vast majority of society, including parliamentarians and the press, denouncing them as "maudlin sympathisers" with vicious criminals. Slowly their views gained wider, if limited public toleration, even though they fell well short of acceptance.

A closer examination of these attitudes towards capital punishment, and at times punishment generally, both before and after 1884 will now be undertaken.

1. e.g. speaking of Kanakas generally, Baynes, one of the leaders of the McNeil Reprieve Committee, told a public meeting of over 3,000 that, "These are the smooth tongued wretches that those in the Government wanted to sacrifice two of our white men for". Courier, 22/12/1884.

2. But there was little evidence of such abolitionist views being expressed.
Attitudes in Queensland: 1860 - 1884.

It has already been noted that 1860 saw the attempted introduction of a bill to abolish capital punishment for rape, and, although it was clearly unacceptable to the Legislative Assembly, it did show that at least two of its members were more progressive in this matter than was Sir Samuel Griffith some 39 years later. This early post-separation period was one productive of "liberal" politicians, and the membership list of the First Parliament included such men as Lilley, O'Sullivan, Blakeney, R. Cribb, Groom and Jordan. The last, as we have seen, opposed capital punishment itself, while O'Sullivan claimed a similar position in 1879, but whether such was his opinion at this early stage is uncertain. Another declared opponent of capital punishment at this time was Pugh, the editor of the Moreton Bay Courier. These "gentlemen radicals", however, being no doubt aware that they held views on capital punishment which were far ahead of their contemporaries, made little attempt to coerce or "mould" public opinion on the subject - such would probably have been futile in any case. Thus, although expressing pleasure at Billy Horton's pardon in 1862, the Courier made no attempt to persuade the Government against its intention to hang the Chinese murderer, Tommy, that same year. Also, in 1863, when there was a rumour circulating that the condemned murderer,

1. If it was, he may well have been the absent seconder for Blakeney's bill in 1863.
McGuinness, suffered from fits, the *Courier* made a discreet plea on his behalf:

"We maintain the principle, always advocated by this journal, that the worst use a human being can be put to is that of hanging. (And), although we would not counsel the Executive to depart from a strict course of justice, there appears to us to be sufficient grounds in this case for serious consideration. If at the eleventh hour medical evidence should prove the facts we have stated, the prerogative of mercy might well be exercised, and the life of a human being spared." ¹

But later, after the medical examination had revealed no reason to suppose he had suffered from fits and McGuinness had himself admitted to having knowingly committed the crime, the *Courier* commented:

"At nine o'clock this morning, the condemned man will expiate his crime on the scaffold. Justice has it, and the law allows it. Notwithstanding our avowed objection on principle to capital punishment, we have nothing to urge in this instance why the punishment should not be carried into effect." ²

By 1865, the need would seem to have been felt for a general increase in the severity of punishment, capital or otherwise. The trend of the feeling with regard to capital and corporal punishment within both Houses of Parliament has already been indicated when dealing with the *Offences Against the Person Act* of that year. The *Courier*, which had come under the influence of W. Baynes, already mentioned for his attitude to Kanakas in 1864,

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now edited by W. O'Carrol and George Hall, attacked the idea that punishment should be aimed at reforming the criminal as "the pseudo-philanthropic idea (of) making sentences for grave crimes much lighter than formerly, (which) has found so much favour in high places, and is really so convenient to a government who find worthless incapables ... eating up so much of the expenditure ... For the sake of our colony, we hope that we may be spared from the sentimental fever of sympathy towards those who pester society, and that the old system of rigorous and swift punishment will be awarded to the offender where, generally speaking, no temptation has been offered. It is undeniable that poverty and a bad record are the most prolific causes ... and sources of crime in the Old Country, nor can we ignore these causes as extenuating the crime in some degree ... (But here), every well-disposed member of the community has every impediment, generally speaking, removed from his path to pursue a virtuous and orderly life. In all cases of grave offenses to person or property, the punishment must be equally commensurate visited with that severity and swiftness which ought to overtake the individual who rebels against society."  

1. That the need was seen for such an attack would indicate that the idea must have had some support at the time. This in itself is quite remarkable given the minor role it was to play in notions of punishment during subsequent years, but it supports an earlier submission on this being a "liberal" period, somewhat ahead of its time. Pugh's "soft" approach would also seem to have been not without some influence. The fact that attempted murder ceased to be a capital offense in 1865 was in itself a progressive step in comparison with the position in the other colonies.  

2. *Courier, 5/7/1865.*
Capital punishment, not surprisingly, was considered "absolutely necessary for a country where the arm of the Executive is not too strong ... The method has the sanction of human conscience after all. We cannot afford to experimentalize to any extent on the likelihood of great criminals being reformed; they must be severed from society when they can no longer be trusted as members of it."¹

This general attitude continued during the following years, as has been seen in particular regard to robbery under arms with wounding. Some concern was felt for the 23 year old murderer Palmer in 1869, but efforts for a commutation found no favour with the Executive or the Courier. There was no sympathy, of any kind expressed for Archibald, who had planned the crime for which Palmer and Williams were executed, despite the fact that he had confessed to his part in the crime after learning of the Government's promise of a pardon to anyone, other than one of the murderers, who could give evidence leading to a conviction of the offenders. The Courier would seem to have interpreted public feeling correctly when it commented:

"The Executive is to decide on Archibald's fate today. As the worst of the gang, he certainly deserves the punishment already inflicted on Palmer and Williams", and we can well believe that any commutation of his sentence would be regarded by the public with great disfavour."³

¹. Courier, 5/7/1865.
². The delay had been caused by his appeal to the Pull Court, alleging that his confession was induced by the promise of a pardon and so was not a voluntary confession capable of being used in evidence against him. The appeal failed but the decision is open to question.
³. Courier, 9/12/1869
He was hanged three days before Christmas.

The mismanaged execution of Matter in 1879 aroused criticism of the Government in the Legislative Assembly. Rutledge, Garrick and Griffith objected to the fact that there had been no public announcement of the Executive's decision to execute, while O'Sullivan pointed to the unsightly way in which the criminal was mutilated. Three members, Bailey, MacFarlane and O'Sullivan, also took the opportunity of proclaiming their opposition to capital punishment, but the leading members on both sides of the House refused to be drawn into such a debate, and the Courier and the Queenslander, although giving wide coverage to the incident and to the interest aroused by it in the Legislative Assembly, completely omitted any mention of the three speeches favouring abolition. So long as those interested were given the opportunity to petition on behalf of a condemned man most people appeared content with the infliction of the death penalty on murders.

The "Hopeful" Prisoners and the Effect of the Agitation on Their Behalf.

Late in 1884, MoNeil and Williams were tried and convicted, before Lilley J.C., for the murder of two Kanakas on the high seas. There was an immediate public outcry against the verdict, which had been based largely on the evidence of other Kanakas, and the Government was petitioned to commute their sentences. A thorough investigation of the issue lies beyond the needs of this thesis, but the chief basis for the public agitation may be said to have been that these would have been the first white
men executed for offences against black men in Queensland, although party politics played their part too.\(^1\) Having found that blatantly racist arguments were of little weight with Griffith, (although such was not the case with the public generally) more persuasive reasons in favour of commutation soon began to be put forward. One of these was that, since sailors engaged in "Blackbirding" held such little regard for the lives of black men, they would be deterred from the commission of such atrocities, as the crew of the "Hopeful" had committed, by the fear of life imprisonment to as great an extent as they would by the fear of the death penalty.

Reluctantly, Griffith acceded to the public demand but later publicly lamented the fact that

"so many men were found in this colony who prayed for the lives of the two murderers... No two men ever more richly deserved capital punishment."\(^2\)

It is interesting to note that only two men Midgley, M.L.A., (an ex- Wesleyan Minister) and Spode (a member of the jury that had convicted McNeil) actually spoke against capital punishment generally. However, the fact that the Premier had told the deputation early in the campaign that such an argument "was not one on which the Executive could act"\(^3\) may well have caused such

\(^1\) The Griffith Government had declared that its avowed aim was to "clean up the Kanaka Traffic" and had thus cast aspersions on the former McIlwraith Government's administration of the "Traffic". Griffith had also been disturbed that the crew of the "Alfred Vittery", who in the previous year had been charged with offences of the same nature as those of the "Hopeful" prisoners, had been acquitted.

\(^2\) *Telegraph*, 24/6/1885.

\(^3\) *Courier*, 13/12/1884.
views to be kept silent. The fact that only two of the 50 odd taking part in the agitation in Brisbane advanced abolitionists views also supports the claim that racial prejudice, not mercy, was the real basis of the agitation.

The agitation and the ill-feeling aroused against Griffiths because of his reluctance to extend mercy to the condemned men proved to be suitable political weapons with which to gain a convincing victory at the 1888 general elections for McIlwraith and his supporters. Griffith had declared that no further mercy would be shown to any of the "Hopeful" prisoners, but McIlwraith pledged to have them all released. Petitions to this end were collected all over the colony and 28,070 signatures were collected. McIlwraith won a resounding victory at the polls and Griffith had to be content with being the junior member for Brisbane North, for McIlwraith headed the poll in Griffith's own electorate.

The prisoners were released in 1899, despite Lilley C.J.'s recommendation to the contrary, and his claim that "the petition is the outcome of the excitement of the last election, and is an attempt to rule the Administration of justice by popular clamour."

1. It was never a good policy for a deputation to argue against capital punishment, since the Government would almost certainly reply that its duty was to enforce the law as it was, leaving alterations in the hands of Parliament. Thus, Brookes in 1880 specifically announced that he was not opposed to capital punishment, while Rev. Osborne, in 1892, warned the ladies deputing on behalf of Horrocks that they would be wise not to divert their attention to such an issue as abolition.

2. There were others convicted of kidnapping only.

One reason for the release argued in the petition, and accepted, in the context of the particular case at least, by the Morehead Government, is of special interest:

"Punishment for offences against the law of a country come into being, not for the purpose so much of society revenging itself upon the law-breaker, as to act as a deterrent against others committing similar breaches. In this case, even supposing the crimes for which the prisoners were convicted were committed, the purpose of the punishment has been fully served. Lawlessness in the South Seas in connection with this trade no longer exists ... We think the prisoners have already suffered sufficiently, the law having been vindicated and the purpose of the law having been served."  

Whether those responsible for framing the petition really believed that this was the main purpose of punishment does not greatly alter the fact that the public expression of such views by men who, after the 1888 election, were prominent members of the Government, could only serve to convince the public that not only should such be the main purpose of punishment, but that it was so accepted by the Government. Deviations from the policy in the future would, thus, tend to arouse agitation on behalf of condemned men towards whom the above principle did not appear to have been adopted.

This idea of making the punishment fit the particular crime would explain the fact that ignorance of the law could

1. McIlwraith having resigned because of ill health
be argued in favour of condemned Kanakas, but sex and youth were not suitable reasons for commutation, since it was equally necessary to deter women and young men from the commission of brutal murders as it was to deter adult males. Thus, Mrs. Thompson and Frank Horricks were hanged in 1387 and 1892 respectively. The former decision to execute was accepted on the basis that "crime knows no sex, and the crime was of a singularly brutal and morbid type," although there was precedent for sparing a female murderer's life. The decision to execute the 17 year-old Horrocks, son of the Inspector of Orphanages, caused some Brisbane ladies, assisted by Rev. Osborne and W. Widdop, a city commission agent, to circulate a petition on his behalf and to send a deputation, led by Lady Bell, to Premier Griffith. The Courier, although initially being favourably disposed towards a commutation, was, however, prepared to accept Griffith's reply to the deputation that:

"If this youth was not hanged, it would mean that no youth under 18 could be hanged for murder." Such a position, the Courier concluded, was clearly untenable,

1. Courier, 14/6/1897.
2. e.g. Annie Judge had her sentence reduced to 10 years in 1885; but she had committed the crime, that of killing her child, shortly after child birth and while in a deranged state of mind.
"the sad misfortune is that social safety in these colonies is menaced by a class of youths who would regard the escape of Horrocks as a license to all extremity of wickedness ... Consider what it would mean if it went forth to the larrkinism of Brisbane that no youth under 18 would die for murder. With infinite regret we are bound to say that the whole discussion makes it clear ... that the sentence of the law must take effect."¹

In 1895, when six Kanakas were convicted of murder in the Bundaberg district, the local residents demanded their death in order to deter other Kanakas from the commission of similar crimes. The Courier, however, not being as directly threatened by Kanakas as it was by Brisbane larrikins, argued that their ignorance of the law was worthy of some consideration. The result was that two of the condemned men were executed, with 14 other Kanakas being brought from various sugar-cane growing areas to witness the execution. They were said to have "watched every moment with extreme anxiety and horror"²

The presence of the deterrent aspect was obvious in the Executive's decision, yet "regard (had been had) to the deserts of the individuals arraigned"³ The Courier fully approved "Mercy has been judiciously mingled with justice," it claimed.⁴

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2. Courier, 21/5/1895.
3. Courier, 9/5/1895.
It can thus be seen that by the mid-1890s revenge had become of minor consideration in most capital cases, with deterrence being the major rationale for the infliction of capital punishment. This aspect too was no longer considered sufficient to warrant the automatic carrying out of the death sentence. In all but the most brutal of murders, some reason could usually be found for urging, often with success, a commutation of the sentence, as the figures in Table 7 have already indicated.

**The Coming of the Criminal Code.**

The years immediately preceding the introduction of the Criminal Code Bill into Parliament saw a complete discontinuance in the exercise of the extreme penalty for all capital offences, including murder. The reason for this, in the case of murder, was no doubt due to the fact that public agitation on behalf of the condemned men was so prevalent in cases of murder which were not premeditated. Accordingly, Griffith provided in his Draft Code for a distinction to be made between wilful murder, for which the intention to kill had to be proven, and murder, while the old concept of "malice aforethought" was completely abandoned. The definitions of murder and wilful murder covered most forms of homicide previously falling within this concept, but several other forms of once capital homicide came to be classed as manslaughter only. In the case of a conviction for murder, the trial judge was to be given the opportunity of recording the death penalty, instead of pronouncing it.
But no such discretion was given in cases of wilful murder.

There was never any suggestion of abolishing the death penalty for murder, but only of redefining the classes of capital homicide. This is evidenced by Griffith's own words in the letter he sent to the Premier in October, 1897:

"The question whether homicide committed under any circumstances (covered by the common law definition of 'malice aforethought') should be punished with death is an entirely different one from that of the definition of the offence which is to be visited with that penalty." 1

It was left for Joe Lesina in the Legislative Assembly, on the Second Reading of the Criminal Code Bill, to make such a suggestion.

The Labor Party and Capital Punishment in 1899.

Before dealing with Lesina's attitude to abolition, it will be as well, so as not to confuse the one with the other, to ascertain what that of the majority of the Parliamentary Labor Party was. 2 During Rutledge's Second Reading speech, Glassey had suggested that the distinction between wilful murder and murder could be reinforced by a corresponding difference in punishment for the two offences, and that only the former need carry the ultimate penalty. The Attorney-General, however, had quickly rejected any such relaxation in the

1. Griffith to Nelson, 29/10/1897.
2. See Appendix 3 for a List of Labor M.L.As. in 1899.
application of capital punishment, and had warned the Labor members that attempts to limit capital punishment to a greater extent than the Government had already proposed "would be stoutly resisted by the Government*. But he indicated that reform as regards the use of solitary confinement and corporal punishment would be possible. It was in these areas of punishment, as well as the use of irons in prisons, that the Labor members as a whole took their stand, and with a good deal of success. Perhaps the reason for their not supporting Lesina in his opposition to capital punishment stemmed from a feeling that not only was it a hopeless cause, but also one which would merely have served to 'stiffen' Government and conservative opposition to these other seemingly more easily attainable types of penal reform. Another possibility is that, in general, Labor members did not favour abolition for wilful murder. This claim is reinforced by Glassey's suggestion (already mentioned) and the attempts, if somewhat half-hearted, which were made with regard to piracy and treason. Fitzgerald also suggested that the decision as to whether the death sentence should be passed on the criminal should be left to the jury, the Executive still having the power to exercise the prerogative of mercy at a later stage if it was so desirous.

However, the fact still remains that Lesina was given the first speech in reply to the Attorney-General's Second Reading address. Perhaps, then, Labor had intended originally to support Lesina, but had changed its position in favour of
reform in other areas of punishment - corporal punishment in
particular. Unfortunately, access has not been allowed
to the Labor Caucus Minutes even for this far distant period,
so any conclusion must remain but tentative. Nevertheless,
Lesina did deliver his two hour attack on "judicial murder"
and did move his promised amendment during the Committee
stages of the Bill. No division was however taken, the amendment
being defeated on the voices. Apart from Rutledge, no
other member spoke to the motion.

Given, then, that Lesina was a "lone voice" in
Parliament and, seemingly, without much support, of an
influential kind anyway, outside it, it may now be
advantageous to consider some of his attitudes to crime and
punishment, since, in the main, they were to form the
foundation for the movement, which, led by the socialist
elements of the Labor Party, was to cause that party to adopt
the abolition of capital punishment as part of its "Social
Reform Programme" some 11 years later.

Lesina began his address by illustrating the gradual
reduction in the number of capital offences that had taken
place throughout the century, and which had again been
evidenced in the bill with which they were dealing at the time.

1. An indication of the fact that Lesina's was a hopeless
cause in 1899 is given by the fact that the Courier made no
attempt to rebut his arguments favouring abolition,
presumably on the basis that it was inconceivable that
anyone would be seriously influenced by them. It contented
itself with commenting that "it had been rumoured he was
good for four hours - the surprise is that he finished
in half the time". Courier, 28/9/1899.
He also pointed to various European States where total abolition had not caused any marked increase in crime.

Speaking of the work in penal reform carried on by Victor Hugo, Wilberforce and Howard he claimed that:

"(their) work, and that of their followers, has raised the moral tone of society (to the extent that) tonight I can appeal for the abolition of the last vestiges of punishment by mutilation — the lash and the gallows. I would like to see them abolished. We have excellent precedent from the other countries of the civilized world ...

By abolishing them, we can take our place among the civilized nations of the world. I am opposed to these punishments because they are forms of mutilation and are altogether foreign to civilized ideas of punishment ... Our punishment today is largely punitive instead of being reformative. Instead of hanging criminals we should place them in correctional institutions ... The purpose of punishment (should be) to cure the offender. The criminal is not a wild beast. My view of him is that he is an erring brother whose feet have wandered from the narrow path which we all weakly strive to follow. Undoubtedly he must be punished, but to take his life is not the way to cure him ... Crime is largely a social product — it is the outcome of our present social conditions. Its greatest breeding grounds are the highly-centralized cities of modern industrial society ... Poverty and ignorance are the chief causes of crime ... The alteration of our social and industrial conditions are reforming influences which will have the effect of reducing crime ... I say that murder is just as much murder when authorised and directed by the Executive as when it is committed in cold-blood by the private individual. I can see no difference, (except that) the circumstances

1. It is interesting to note that Lesina and later socialist reformers in this field never at any stage allowed that the State should have the right to do what the individual should not do — kill another man. No all powerful monolithic State for them, it would seem.
surrounding judicial murder are more cold-blooded and horrible. You tie your victim up and you have him like a rat in a cage. Opponents of the abolition of capital punishment must assume and prove the following propositions:

"1. That fear of death is the only fear that is sufficiently intense to deter from the commission of murder;
"2. That juries are never led by their dislike of capital punishment to give false verdicts;
"3. That innocent men have never been hanged; and
"4. That a week or two of professed repentance for a great crime will ensure the offender's pardon in the next world."

As if aware of his isolated position, however, Lesina concluded with the prophesy that:

"If I should fail it is only I who have failed (for) somebody else, as surely as the sun will rise tomorrow, will take the matter up where I leave it. I feel perfectly sure that it will not be many years longer before the humanitarian feeling which is now spreading through this colony, and all civilized countries, will demand once and for all the abolition of the death penalty."

It is the story of those who "took the matter up"

that attention shall now chiefly be turned.

1. [P.P. (1899), Vol. LXXX II pp. 152-160, inter alia
CHAPTER 5.
"LABOUR OUT OF OFFICE: 1901-1915".

It would seem that socialist thought within the early Labor movement in Queensland was "not scientific ... (but) based on sentiment", and Harris concludes that the early socialists "had a pretty vague idea of what socialism was. It was probably a hazy picture of a land free of unemployment, strikes and squatters." If the words "and the hangman" are added, the above would also seem to be correct as regards their twentieth century counterparts who succeeded, with the aid of the stubbornness, if not ruthlessness, of the Philip Government, in having the abolition of capital punishment included in the party programme by 1910 - men like J.S. Collings, H.E. Boote, and V.B.J. Lesina.

Part of the reason for the seeming lack of support for abolition in 1899, as exhibited by the members of the Parliamentary Labor Party (P.L.P.), may be traced to the fact that, following the failure of the great strikes in 1891, the socialist elements within the party had lost much

2. Ibid, p. 34.
3. See Appendix 4 for a brief biographical sketch.
4. Editor of the Worker 1901-11.
of their influence in the Movement. Crook puts the situation thus:

"The failure of the great strikes precipitated a return to empiricism ... The platform drawn up in 1892 was a practical document stressing electoral reform, education ..., and factory legislation ... The dominance of the moderate political wing was evidenced again in 1901 when a bid was made to widen the electoral support of the party ... The ascendancy of moderates such as Kidston before 1905 was facilitated by organizational weaknesses ... a product of the decline in power of the A.L.P."¹

Another reason almost certainly lay in the fact that the Labor Movement stood for a "White Australia". The early members of the Labor Movement were deeply hostile to "coloured aliens", Kanakas and Chinese in particular, because they represented an economic threat to white labourers and to unionism generally. Given the disproportionate crime rate among, and execution rate of, Kanakas during this period², this racial bitterness did much to lessen the effectiveness of the part played by early Labor men towards a seeking of the abolition of capital punishment.³ Men like Lesina appeared to have been torn between the pleasure of

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2. See Table 3 on page 104.
3. For instance, the Worker (1/6/1901) when commenting on the execution of a Kanaka, contented itself with the following sarcasm: "The Queensland Cabinet helped ruin the sugar industry by hanging a Kanaka on Monday and the Courier did not protest. If the Government go on hanging Kanakas like this, there is a grave danger of Queensland becoming a white man's land."
pointing to such executions as evidence of the "corrupting influence" of Kanakas on society and the sorrow that society should still deem it necessary to inflict such a "barbarous and self-degrading" punishment on even the most vicious or degenerate of criminals. The public support for abolition came from Labor men, with the exception of Lesina, only after the Kanaka Trade had ceased to be a matter of great concern to unionists.

Table 3.

<table>
<thead>
<tr>
<th>Period</th>
<th>Total Executions</th>
<th>Kanakas Executed</th>
<th>Kanakas Executed as a % of Total Executions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1395-1905</td>
<td>15</td>
<td>7</td>
<td>46.7%</td>
</tr>
<tr>
<td>1395-1901</td>
<td>11</td>
<td>5</td>
<td>45.5%</td>
</tr>
</tbody>
</table>

In 1391

- Kanakas = 1.7% of total population
- Kanakas = 5.52% of jail population

1386-92

- Kanakas convicted = 1,097
- Kanakas convicted of:
  - Common Assault = 341
  - Murder, Attempted Murder and Manslaughter = 36
- Total convictions for murder, Attempted Murder and Manslaughter = 163 (approximately)
- Kanakas = 22.7% of total convicted of these offences.
- Offences by Kanakas against females = 13 (i.e. includes offences other than rape)
- Total rape convictions = 15

2. Courier, 6/11/1901, is the basis for most of this.
But even after the Federal Government had legislated to terminate the transportation of Kanakas, the tendency continued for the Worker and Labor men generally (with the notable exception of J. S. Colling who, in 1906 appealed unsuccessfully in the Courier for commutation of the death sentences passed on a Ceylonese and a Kanaka) to ignore the executions of both Kanakas and Chinese. However, part of the reason for this continued practice may lie in the fact that it was merely good political sense to protest publicly against capital punishment only when the particular victim was one whose fate was, or could be made, of general public concern. Thus, the sentencing of such brutal murderers as Beckman, Milewski, Bradshaw, Austin, and Fisby (all Europeans) took place with a minimum of public attention being called to the cases by those advocating abolition, while widespread discontent was either created or, if it already existed, utilized in the cases of the Kenniff brothers and Arthur Rous. Given that their task was to convert both public and intra-Labor Party opinion to abolition, it would have been folly for abolitionists to have pursued any other course.

By the time of the Labor-in-Politics Convention of 1907, the abolitionists had gained sufficient influence within the Labor Party to have the abolition of capital punishment listed among the Convention's recommendations to the F.L.P., while by December of that year public opinion had been converted to the limited extent at least that a non-Labor orientated petition on behalf of the German Milewski
could be framed entirely on the basis of the opposition to
capital punishment. It now becomes opportune to examine the
reasons for this somewhat limited success.

One reason has already been mentioned — the abolition
of the Kanaka Trade. Others were the replacement of the
moderate Kenna by Boote as editor of the Worker in 1901,
and the return of socialists to places of prominence within
the extra-parliamentary wing of the Labor Party following the
1905 Labor-in-Politics Convention. Finally, there was the
trial of James and Patrick Kenniff in 1902 and the subsequent
execution of Patrick in January, 1903. It was this last
mentioned event, and the publicity and public involvement
caused thereby, which did most to secure this support for the
abolitionists both within and without the Labor Movement.

The Kenniffs' Case, 1902-3.

The Kenniffs were horse-stealers, living in the Roma
District, where such was an all too common occupation. In
1902 they were pursued by police and black trackers and James
was captured. He was bound and left behind with two of the
policemen while the hunt continued for Patrick, but, when
the unsuccessful searchers returned to camp, James was gone
and the policemen were dead. The two brothers were later
seen together by a black tracker. They were hunted down
and finally captured, and were brought to Brisbane for trial
instead of to the Roma Circuit Court. They were tried not by a
common jury of 12, but by a special jury of four — a jury
normally reserved for civil cases. Both were convicted of
wilful murder and the trial judge, Sir J.W. Griffith C.J.,
passed the death sentences on them, but respited it pending
an appeal to the Full Court.

This appeal was dismissed, but not before Real J.
had cast serious doubt on the adequacy of the proof against
James Kenniff. In what must be one of the most outspoken
judgments of all time from an appellate court he said, with
regard to the evidence adduced by the Crown against James
Kenniff:

"I would consider myself a party to the murder
of James Kenniff if I went on such evidence as
that, (Griffith C.J. objected). The Chief
Justice knows perfectly well that I consider what
he said to the jury was said in perfect honesty
and propriety ... (The evidence) may commend
itself to my brother but I have not his cast of mind,
and if it will justify him it will not me. If you
cannot show some act you cannot go on 'surmise'."

The Courier, which, along with other Brisbane newspapers,
had branded the Kenniffs as murderers before they were finally
captured, attempted to gloss over Real J.'s strong dissent
by saying:

"(The Full Court) unanimously, except for one small
detail, upheld the jury's verdict".

But this "one small detail" did not pass unnoticed by the
public. Already the change of venue of the trial, the type of
jury used, and the Brisbane Press's verbal conviction of the

1. Worker, 6/12/1902.
2. Courier, 11/12/1902.
3. It was called a "class" jury by the Worker (2/12/02) because
   only property owners or business men could be empanelled for
   a special jury, while others pointed to the fact that only
   two of the 72 on the jury list were Catholics - the religion
   of the Kenniffs.
men prior to their capture had aroused the public of Roma and Toowoomba and soon the four jurors were to come under heavy criticism in Brisbane itself. The fact that Griffith C.J. had sat on the Bench to hear the appeal from his own summing-up to the jury also did not pass unnoticed, and a correspondent writing to the Worker pointed to the fact such would not have been lawful had it been a civil case, "a case affecting property instead of the lives of men". Almost immediately after the failure of the appeal the Kenniffs' solicitors, O'Neil and McGrath, informed Premier Philp that an appeal on behalf of either both or one of the brothers to the Privy Council was being considered, and asked that there should be a stay of execution. A concert, attended by some 500 people, was held in the Centennial Hall after Christmas aimed at raising money for the appeal; at the conclusion of it, Lesina appealed for donations and, although expressly approving of the death penalty where murder was clearly proven, urged that, as such was not the case with the Kenniffs, they should not be hanged. Petitions were, at the time, being signed with this end in view in Brisbane, Toowoomba, Charters Towers, Townsville and Rockhampton. On December 24th, O'Neil told Philp that it had been decided to petition the King-in-Council

1. Worker, 27/12/1902.
2. A lie, but no doubt good politics.
for permission to appeal to the Privy Council on behalf of both the brothers, but on December 31st the Executive Council announced that the sentence on James Kenniff had been commuted to life imprisonment, and that Patrick would be hanged on January 12th. The Government's attitude to the intended appeal to the Privy Council was put by Attorney-General Rutledge as follows:

"Counsel may go to the Imperial Authorities if they choose; but the Governor-in-Council is not controlled by any intention on the part of the prisoners to appeal. If the Governor-in-Council considered there were just grounds for appeal they might, as a matter of favour, hold the case over until leave had been applied for and refused, but there is no legal obligation on the part of the Governor-in-Council to do so."¹

The appeal by Patrick Kenniff was finally abandoned, for he would have been dead before a reply could have come from England. The possibility of cabling the petition was considered, although the cost of such was estimated at more than £500, but Philp refused to delay the execution until even this could be answered. There was no High Court at that time and no Sir Owen Dixon, and Philp succeeded where Bolton was later to fail.²


2. The High Court (in 1961) issued a restraining order against the Victorian Government forbidding it to execute Tait until his appeal on the grounds of insanity had been dealt with.
This show of "determination" by the Government did much to aid the cause of the abolition of capital punishment in Queensland.

Several public meetings were held in Brisbane and Toowoomba, at which Lesina spoke against the fact that Kenniff "was being deprived of his rights as a British subject", and claimed that "the ends of justice would suffer no risk of being defeated by the postponement of the execution". At the meeting held on the Saturday prior to the appointed "execution Monday", despite continued heavy rain, over 4,000 people stood in Albert Square, to hear him. Deputations waited on Philp and the Governor and petitions were signed in various parts of the State. But the Government remained immovable throughout, and it was firmly supported in its stand by the Courier, which, however, rather unwisely admitted that, were the Scottish verdict of "not proven" available, such may have been the better decision - apparently forgetting that guilt, not innocence, had to be proven before a conviction might be had under English law. It based its approval for the execution of Patrick Kenniff on the following proposition:

1. Courier, 6/1/1903.
"If life in the West is to be at all bearable there must be the clearest advertisement of the ability of the law to reach and punish the insolent law-breaker," and expressed confidence that "the agitation engineered by Mr. Lesina ... (was by) an irresponsible minority".

Nevertheless the hangman seemed to think it prudent to appear "heavily disguised with a heavy black beard and darkened spectacles" when performing his task and the Kenniffs became heroes and martyrs in the Roma District and elsewhere. In the following years, various deputations appealed for James' release (which was finally achieved 12 years later), and the execution of Patrick was still spoken of as a "blot on the fair name of Queensland" as late as the early 1920's.

**Developments Within the Labor Movement.**

It is difficult to actually assess the effect of the case, and Lesina's "engineering", on the Labor Movement itself, but certainly the *Worker*, even before the Government had

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1. *Courier*, 12/1/1903.
2. *Courier*, 12/1/1903.
5. Indeed "old-timers" may still be found who profess a belief in the innocence of both brothers, although the evidence against Patrick, given a better Government handling of the situation, would almost certainly have been sufficient to have soon removed any lasting doubts as to his guilt.
decided to execute Patrick Kenniff, came out strongly in opposition to capital punishment. The writer of the article may have been Lesina himself, for much of the phraseology used was identical with that used in the speeches of Lesina's as reported in the Courier, and Lesina was a journalist and had in previous years had his own column in the Worker. Or it may have been John Pihelly who worked for that newspaper for a while as a journalist. But, regardless of this speculation, it is at most certain that the views expressed were acceptable to the editor, Boote. It has been said that Boote exercised considerable influence on the Brisbane Workers' Political Organizations (W.P.Os) and on Dave Bowman, who in 1907 replaced Kerr as leader of the A.L.P., and there is no doubt this greatly assisted the cause of abolition within the Movement. Also, much of the agitation on behalf

1. This change in attitude by the Worker since 1901 is not really too surprising, for, not only had the fear of Kanaka competition been greatly reduced by December 1902, but also Boote, the new editor, was, like most early Labor socialists, and indeed most of the Members of the Movement, of strong pacifist tendencies, being opposed to war and killing in general. It was not unlikely, then, that opposition to capital punishment would soon be forthcoming, from such a man. Indications of this pacifist tendency and the obvious application of it to capital punishment are seen clearly in the following two extracts from the Worker, both before and after Boote became editor:

"By and by we will not enter in the list of heroes and give titles to the man who needlessly kills another man." (27/4/1901).

"The Labor Movement (stands for) a kingdom based on social and economic justice, in which 'Thou shalt not kill' means that not only individuals, but governments shall not shed human blood." (14/12/1901).

of the Kenniffs took place in strong Labor areas such as Rockhampton, Roma, and Charters Towers, but the fact remains that Lesina was the only M.L.A., or prominent Labor man even, to be publicly involved in the matter.¹

At all events, by 1904 P.L.P. leader Kerr was reported by the Courier as having said in the Legislative Assembly, that "the Labor Party does not believe in capital punishment". This statement had been induced by the Opposition’s attack on the Morgan Government’s decision to commute the death sentences passed on Mr. and Mrs. Macdonald, who had ruthlessly tortured and starved to death the husband’s 14 year old daughter. Opposition members and the Courier claimed that the Government’s action had been directed by the Labor Party which was supporting, and indeed preserving, the Government in the Legislative Assembly. "The tail wagged and the dog followed"³ was the claim. Possibly this was true up to a point,

1. According to Lesina, there were a number of M.L.A.’s (probably Labor members, but he did not specifically say so) who strongly objected to the Executive’s decision to hang Patrick Kenniff, but they were reluctant to take a public stand on the matter. Lesina was particularly harsh in this criticism of them because of this reluctance.


but the situation quickly changed and neither the Morgan Government nor the subsequent Kidston Governments later showed very much less willingness to inflict capital punishment in suitable cases than the previous Philip Government had.

\[\textit{Table 9. Murder Trials.}\]

<table>
<thead>
<tr>
<th>Period</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>Total Executions Tried</th>
<th>Executions as a % of Convict- ions as a % of trials.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901-3</td>
<td>14</td>
<td>12</td>
<td>26</td>
<td>7</td>
</tr>
<tr>
<td>1905-10</td>
<td>27</td>
<td>26</td>
<td>53</td>
<td>9</td>
</tr>
<tr>
<td>1911-14</td>
<td>14</td>
<td>9</td>
<td>23</td>
<td>3</td>
</tr>
</tbody>
</table>

This would indicate that:

(1) the public still approved of capital punishment for vicious murders;

(2) The I.I.P., while it supported the Morgan and Kidston Governments, either (a) did not oppose capital punishment, or (b) if it did, did not consider the matter important enough to attempt to apply pressure to the Government over it, or (c) it did so try; but

(3) the Governments did not think it expedient to abolish capital punishment.

At all events, Kidston had never publicly opposed capital punishment in the past and he appeared convinced as to the
necessity of retaining it in 1909. Throughout the period that the P.L.P. supported the Morgan and Kidston Governments, Kidston exercised a dominating influence within the P.L.P., and this no doubt did much to account for the continued and not infrequent exercise of capital punishment. After the final Labor-Kidston split in 1907, the Labor Movement no longer had any real chance of influencing the Government.

The Macdonald’s case proved somewhat embarrassing to abolitionists because of the hideous nature of their crime, but nevertheless the Worker claimed:

"The Executive has done right... Society has no more right to strangle a man on the gallows than has any member of it to strangle another in bed... Man as a mass cannot morally do what is condemnible in man the individual... Revenge is not justice... What reason guided the Executive (we) are unaware, but it is not easy to believe that it could have been any other than a conscientious objection to capital punishment. If that is so, it deserves the commendation of all... (But) if the Cabinet is opposed to capital punishment it ought to say so straight out, and lead the way to abolition. One thing is certain, the present Ministry can never henceforth consent to the hanging of anyone without pronouncing judgment against itself."1

The Socialist Revival.

The 1905 Labor-in-Politics Convention saw a return to power within the Labor Movement of the socialist elements, with Trades Hall men Reid, Bowman and Hinchcliffe being elected to the Executive positions of the Central Political Executive (C.P.E.),2 and the Party’s platform amended to include the

2. J.S. Collings was another of the eleven men elected to the C.P.E. by the Convention.
"socialist objective". But no mention was made at the Convention of capital punishment. Lesina, as was so often the case later, was not meeting with the Party's approval at this time as was evidenced by the fact that he finished last in the elections of C.P.E. members. This return to power of those most favourable to abolition had little or no effect on the P.L.P. where Kidston supporters Kerr and McDonnell held the positions of Leader and Deputy Leader. However, a split within the P.L.P. was imminent and, when Parliament resumed in 1906, Bowman refused to attend Caucus meetings because of the presence there of Kidston and his followers, while Lesina took up a position on the Opposition cross-benches and joined with Hardacre in touring the State on a speaking tour in opposition to Kidston.

The victory of the abolitionists within the extra-P.L.P. was, however, far from won, despite the Trades Hall - Socialist victory in 1905, for it was quite clear that not all socialists were abolitionists. This is evidenced by the fact that Collings, who did much to assist the abolitionist cause by means of discussions of crime and punishment generally on "Free-Admission" nights of the Social Democratic Vanguard (of which he became President in 1906), in July 1905 received severe criticism by way of a letter to the Courier from the Valley W.P.O., for his opposition to capital punishment. As Secretary of the Brisbane Political Labor Council, he had managed to have a resolution, calling for a commutation of Warton's sentence, passed by that body and transmitted to Home Secretary (and
ex-Labor member) Airey. The Valley W.P.O. claimed that not only had the Council "exceeded its functions" by so doing but that also "upon the question of capital punishment a difference of opinion exists among the various W.P.Os within the State". Collings' reply was that, if the Valley W.P.O. upheld capital punishment,

"the sooner it hauls down the flag of socialism - the flag that the newly adopted objective has nailed to the mast of every W.P.O. in the State - the better for the progressive movement. Labor has no room in its ranks for apologists for such effete and brutal methods of a barbaric past ... I trust that the action of the Valley W.P.O. will be widely repudiated."  

Such repudiation did come in an indirect way from the Worker, which claimed:

"the execution of Warton (is) indefensible in principle, and the action of the Government, weighed in the scales of the Macdonald precedent, (is) an outrage upon public decency,"

but no direct attack was made on the Valley W.P.O.

1906 saw the execution of three men— all "coloured aliens". They passed without criticism by the Worker, but once again Collings, this time as President of the Social Democratic Vanguard, wrote to the Courier saying:

1. Courier, 13/7/1905.
2. Courier, 15/7/1906.
3. Worker, 22/7/1906.
"On behalf of the hundreds of men and women who are members of the Vanguard, and of the thousands who, while not being Socialists, are yet actuated by altruistic motives, as well as myself, Mr. Editor, I ask your kindness in publishing this public protest ... to the hanging on Monday next of two human beings."

On the afternoon of March 13th, 1907, a list of nine recommendations to the P.L.P. was adopted by the Labor-in-politics Convention. Fourth on the list was the abolition of capital punishment. No record of any debate on these recommendations appears in either the Worker, the Courier, or the "Official Report of the Fifth Labour-in-politics Convention, 1907", but a gauge of the relevant strength of the abolitionists and the P.L.I. may be ascertained from the facts that an attempt by Kerr to effect a reconciliation with Kidston was defeated 36 - 6, while Lesina this time tied for eleventh place on the first ballot for the election of C.P.I. delegates out of a field of 27, and was beaten on the second ballot by only five votes. Any chance the recommendation might have had of influencing the Government, however, was ruined by the defection of 14 members of the P.L.P. to Kidston but, nevertheless, the fact of its adoption by the Convention, which was largely C.P.O. - dominated, gave evidence of a partial victory for the abolitionists within the Labor Movement.

1. Courier, 15/7/1906.
The Execution of Arthur Ross, 1909

Mention has already been made of the agitation, with which neither the Vanguard nor prominent Labor men seemed to be publicly associated, on behalf of the German, Milewski, in December, 1907, and which was based entirely on the opposition to capital punishment. But it was not until the announcement by the Government of the intention to execute Ross in 1909 that public support can really be said to have fallen in behind the abolitionists, or at least to be no longer opposed to their efforts.

Ross, a young man of 21, had been convicted of the murder of a bank attendant, Muir, but the jury had expressly acquitted him of wilful murder and had strongly recommended him to mercy on account of his age. Despite these factors, the Government decided to carry out the execution. Once again Collings was the first correspondent on the matter to protest in the Courier, but on this occasion he was joined by five others, only one of whom approved of the Government's decision, and the Worker was also quick to take up the cry that "if Ross is killed in the name of the people, there will be blood on the hands of us all. And our offence will be greater than his for it will be a deliberate killing."¹ The idea that, in a Democracy, all are in some

¹ Worker, 5/6/1909.
way responsible for Governmental acts such as executions was clearly implicit.

On the Saturday preceding the execution, the Albert Hall was completely filled, and an overflow crowd of some 400 assembled in Albert Square. The Hon. H. Jensen, M.L.A., (a Brisbane solicitor) acted as Chairman of the meeting, at which the Mayor (Wilson), Mr. Williams (Christian Temperance Union - C.T.U.), 11 Labor M.L.A.s., five ministers of religion, and Messrs. Boote and Seymour (among others) were present on the platform. A resolution calling for a commutation of the death sentence was passed and a petition containing some 3,000 signatures was presented to Lieutenant-Governor Morgan, who had come down from Warwick that evening to receive it. A petition was also sent from Ipswich, the pleasing feature of which was that it had been initiated there by the C.T.U., not the Labor Party, as was one from Maryborough (the trial town) which it was said had received 3,000 signatures in 12 hours.²

In premiers Kidston's own electorate, Rockhampton, a deputation "representing all classes of the community"³ waited on him urging him to alter his decision. His reply,

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1. Including some who had been in Parliament earlier.
In the course of his reply to a Peel-hampton deputation, consisting of representatives of all classes of the community, that appealed to him to insist for a commutation of the death sentence on the boy Ross, Premier

Josson said, "the bulwarks of society must not be weakened."

"A BULWARK OF SOCIETY."
that the gallows "were a bulwark of society", was met with bitter scorn and disappointment by the Worker, by way of cartoon, editorial and feature article.¹

"In spite of Premier Kidston and his brother Ministers, with their talk about the bulwarks of society being weakened, the time has arrived for the enlightening modern spirit to repudiate the grisly gospel of the Gallows", its editorial concluded, and Rev. Howe's sermon in the Albert Street Methodist Church in favour of abolition of capital punishment was praised as "a manly and enlightened deliverance". The large crowd that gathered to hear him was deemed to have shown "conclusively that public sentiment is ripe for the removal of this relic of savagery from the Criminal Code."² For perhaps the first time in Queensland such a claim appeared to be not without justification.

Indeed an Anti-Capital Punishment League was formed in Brisbane, but interest in it seemed to have been but transitory. ³

1. Worker, 12/6/1909. A reproduction of the cartoon appears opposite this page.

2. Worker, 12/6/1909.


4. No information has been found as to the composition or function of this league. It was apparently formed in Brisbane either during the campaign on behalf of Ross or soon after his execution. The press at the time appears to have made no mention of its formation and the only reference the present writer has found to it was in a letter to the Courier in 1912, complaining that the league had been so inactive.
The Intra-Party Battle is Won

Less than a year after Ross' execution the sixth Labor-in-Politics Convention was held. Item No. 16 on the list of motions was that abolition of capital punishment should become part of the Party's General Programme under the heading of Social Reform. Maugham's motion for its adoption was accepted without debate.

From this time onward until 1916, the matter became almost a "dead issue" with the Labor Party and the Worker, and the four subsequent executions before Labor's victory at the polls in 1915, passed without criticism by either Collings, the Worker, or the Daily Standard, which had begun publication after the strike of 1912. Part of the reason for this must lie in the fact that, having won the battle within the Party, abolitionists then felt content to await the Party's victory at the polls so that the reform might be implemented. Another reason might be that the chief concern of the socialist and unionist elements within the Party during this time was with the strike of 1912, while another was that Seymour had taken over from Boote as editor of the Worker in 1911.

1. M.I.A. for Ipswich. He had not been present in 1909 at the Albert Hall Meeting but had sent a telegram of apology and support.
The Year 1912 had also seen the removal of Lesina from the Queensland Political scene, although his influence within the Labor Movement had been almost negligible for some time prior to that, and, with the failure of the strike a return of "moderates", led by T.J. Ryan, to control of the Movement's Political wing, and eventually, after the 1913 Convention, of the C.P.E. - the unionists influence having suffered greatly due to the failure of the strike. Again, the attitude of the Denham Government to punishment was not greatly different to that held by the R.I.P.

The Denham Government

Before concluding this chapter it may prove of interest to notice briefly the attitude of the Denham Government to both capital and non-capital punishment. As Table 9 showed, the execution rate under this Government was lower than it had been under Kidston and Morgan since 1904. Despite the fact that its decision to commute the death sentence passed on the one-time asylum inmate, Frisby in 1912 met with hostile criticism from both the Courier and Stevens (M.L.A. Rosewood), the Government stood firmly by its decision. The Secretary for Railways, Faget, told Stevens that it was the Government's "duty to take all the circumstances of the case into consideration"\(^1\) when dealing with a death sentence, and

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not to act in quest of vengeance.

Speaking on a different matter, Home Secretary

Appeal gave a further indication of his Government's

attitude to punishment generally when he claimed:

"Criminologists are unanimous that where it
is possible to reform a criminal, it is
the duty of the State to undertake that reform -
the State must do everything possible to uplift
the fallen man and restore him to the self-
respect he has lost ... If we could succeed in
reforming 1% of our criminals we should do a
work that would commend itself to every member
of the community."1

The contrast to Stevens' remark that

"it was a cruel thing that the parents
of the poor child (whom Frisby had killed)
should be taxed for the maintenance of her
murderer"2

is rather obvious.

1. Q.P.D. (1912) Vol. CXII, p. 1946. The Secretary for the
Public Instructioin (Blair) gave similar views in 1914
when dealing with the Criminal Code Amendment Bill of
that year. He had been the Attorney-General when the
case of the MacDonalds had been considered, but had
been dropped from the Kidston Cabinet by the time of
Ross' case in 1909. He was appointed to the Supreme
Court in 1921 by the Theodore Government and was later
Chief Justice of the Queensland Supreme Court.

CHAPTER 6

ABOLITION

The First Attempt - 1916

Although, as has been said, the Labor Movement was on a public level anyway, far less vocal in its opposition to capital punishment after the 1910 Convention, much interest continued to be exhibited in penal reform generally by some Labor M.L.A.s. Their main emphasis was placed on the necessity to make punishment reformatory: speeches with this aim in view were delivered in the Legislative Assembly in 1910 by Winstanley and in 1912 by Adamson, Bertram, Payne and Kirwan. At the 1913 Convention, the abolition of capital punishment had become second on the list headed "Social Reform" in the General Programme on the motion of Samford (Kurrumba) and Mrs. Miller (Townsville). However, this elevation was due to the fact that reforms previously ahead of it in this section of the platform had been legislated on by the Denham Government.

Despite the fact that a certain reform measure might be in a Government Party's platform, it is in the hands of the parliamentarians to decide on when, and perhaps even if, the matter is to be legislated upon especially when they are led by a man of such influence throughout the entire party as T.J. Ryan. Ryan's was the first effective Labor Government
in Queensland and it was scarcely surprising that, especially given the currency of the Great War, reforms other than abolition were given priority during the 1915 parliamentary session. However, the Deputy Minister for Justice, John Finley, was an idealistic young man and in 1916 he was given the honour of introducing into the Assembly a bill to abolish capital punishment. He had apparently long been opposed to capital punishment and was "pardonably proud" of his bill. Needless to say, there had been no executions since the coming to office of the Ryan Government (although no official announcement would seem to have been made to this effect), nor was there to be an execution during the seven years of Labor Government prior to the abolition of capital punishment in 1922.

First mention of the 1916 bill appeared in the Governor's Address, where it was fourteenth in the list of intended bills for the session. Perhaps because of its simplicity, or because of a belief (given the Denham Government's general attitude to punishment) that it would meet little opposition and be quickly passed, or perhaps because of pressure from the F.L.P. or from the C.P.B., the bill was rapidly promoted in the list and was introduced during an adjournment in the

1. Larcombe, op. cit., p. 78.
2. The Courier offered no particular hostility to the measure at this stage, but reference was made to it by way of a general criticism of the Government's intended policy, viz. "Trivial matter, like the abolition of the death penalty, are not going to help the Empire in its struggle". Courier, 23/7/1916.
Address in Reply on August 5th. The Second Reading was
taken on the 8th and the Third Reading on the 15th, after
which it was transmitted to the Legislative Council, where it
was read for the first time on the 19th. On October 3rd,
however, the Second Reading was defeated on the voices and
the bill passed from the business paper.

The passage of the bill through the Legislative
Assembly was characterized by an apparent lack of interest
in it by the more senior members of the Government (one
might also say the more practically-minded members) for
the only ones to speak on the bill for the Government were
Finelley, Pollock, Larcombe and McPhail - all representative
of the idealists within the P.L.P. Their speeches too,
although not surprisingly perhaps, lacked any real appeal
to practicalities and dealt with the topic almost exclusively
from an emotional, sometimes academic, aspect. Finelley gave
a precis of the case for abolition as appeared in the current
edition of the Encyclopedia Britannica, a fact which he made no
attempt to conceal, while Pollock's speech, although much
the better of the two, was merely a slightly less emotional
and a good deal shorter version of Lesina's in 1899.

Hinchcliffe, who had the task of attempting to pilot the
bill through the Upper Chamber, gave signs of complete dis­
interest in his handling of it. But this may have been due to a
recognition of the fact that its chances of meeting with the
approval of his fellow members were practically negligible,and
need not necessarily be a reflection of his own attitude towards capital punishment. Even the support from the worker was unimaginative, although unqualified support was of course given. Only the Daily Standard made any real attempt to deal with the reform in a rational and convincing way, for which it received a letter of appreciation from the "Melbourne Criminology Society for the Study and Promotion of the Best Means of Prevention and Cure of Crime".¹

Some excuse may, however, be offered for this failure to attempt to give statistical or other practical forms of support to the abolitionist argument, for it may be argued (but was not) that, given that the taking of human life is wrong, the onus of proof that capital punishment is necessary is thrown on those advocating retention because of its alleged deterrent value. If the abolitionists' case is difficult if not impossible to prove factually, the retentionists' is equally so.

Both the Courier and the Opposition dealt fairly rationally with the bill, but rejected it as either a dangerous experiment or as unnecessary, since Labor obviously would not hang anyone, and insufficient reasons had been given as to why the hands of subsequent Governments should be tied by such a bill. Appel gave consideration to the various European States which had abolished capital

¹ Daily Standard, 27/9/1916.
punishment and decided (rightly or wrongly it is not here argued) that only in Italy had there been a subsequent decline in the murder rate. The reason for this, he concluded, lay in the fact that life in solitary confinement had been made the alternative punishment there. Since he believed that such would be as powerful a deterrent as hanging, he agreed to support the bill if the appropriate amendment was made by the Government. This was completely unacceptable to the Labor penal reformers in the House who were strongly opposed to solitary confinement. The other speakers from the Opposition, Tolmie, Barnes, Vowles, C.E. Roberts and Macarthy, M.L.A., and Leahy, P.Ooles, Parnell and Fahey, M.L.C.s., offered no such compromise. Unexpected support for the measure did come in the Legislative Council from Dr. Taylor, who argued that killing the body merely freed the evil mind from its earthly containment and allowed it to move at will on a higher level, where it was better able to exercise an evil influence on the minds of others. Less harm, he argued, would be caused if the mind were kept captive in the body of the prisoner, who could be looked away out of contact with other people. He concluded rather disappointedly by saying:

1. Under the bill the punishment for the former capital offences was to be life imprisonment, a sentence which the judge was to have no power to mitigate. That, of course, would not have affected the Government's power to exercise the prerogative of mercy. The law today in Queensland is as was envisaged in this bill.
"I do not think I have altered Hon. members' views on the matter. At all events he seems to have been correct in that.

The public generally would not seem to have been greatly interested in the bill or in its defeat, for the conscription issue was stealing most of the political "limelight" at the time. No doubt the fact that there had been no execution since September 1913, and none which had created great publicity since 1909, also had something to do with this general apathy. The Great War, too, would have tended to make death less novel and, consequently, less unacceptable than had been the case in Queensland previously.

An important feature of the reaction to the bill was the fact that no opposition to the proposed reform came from Judiciary, although the Supreme Court Judges had not previously (in 1915) been slow to give vent to public criticism of any Government action affecting the law, nor were they to be so in subsequent years. It would seem reasonable to conclude then, that no great opposition to abolition existed in the members of the Bench. However a knowledge that the Legislative Council would reject the bill might well have done something

2. E.g. the release of certain criminals contrary to, and on one occasion without seeking the advice of, the trial judge, the jury system, the Crown Defenders Department, and the administration of the Police Department all came under criticism from various members of the Supreme Court during the 1915-20 period.
towards suppressing moderate opposition if such existed. 1  
Despite this lack of opposition, the fact that the bill  
had been rejected by the Legislative Council was never used  
by the Government in its campaign against that body prior  
to the referendum seeking the public's support for its  
abolition, but this does no more than show that abolition was  
not of much public concern. In any case, the bill's defeat,  
unlike the defeat in the Council of other bills, caused no  
alteration of Government administrative policy, as all death  
sentences continued to be commuted by the Executive Council  
as previously. 2  

At the Labor-in-Politics Convention of 1920, abolition  
became the leading plank in the Party's Social Reform Programme,  
but once again the elevation was due to legislative recognition  
having been given to the reform previously ahead of it.  
Nevertheless, the fact that abolition maintained its position  
relevant to the other desired social reforms (such as hospital  
nationalization which in 1920 became second on the list) would  
indicate that it was still considered a reform of no mean  
importance by the Labor Party.  

The Second Attempt - 1922.  

In 1921, sufficient supporters were nominated to the  

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1. No criticism of abolition, appears in Deputy Police  
Commissioner O'Sullivan's book Crimes of Crime either,  
although he is quite scathing in his criticism of juries  
-especially men lenient towards prisoners), politicians,  
police training methods and sympathy with criminals generally.  

2. The Judiciary made no protest to this practice either.
Legislative Council to allow for the passage through that Chamber of a self-abolishing bill, and 1922 saw the opening of the first unicameral Parliament in Queensland. A further indication of both the importance placed on abolition by Labor and the absence of strong public opposition to it is seen in the fact that, although only existing in parliament on a slim majority, the Government immediately introduced a bill to abolish capital punishment when the 1922 Parliamentary session opened.

The *Daily Standard*, although warning that

"with only a bare majority over its combined opponents, with a difficult financial position to face consequent of the war's aftermath and bad times, and knowing the fickleness of an electorate that is influenced by the Capitalist press more than by anything else, the Queensland Labor Party has undoubtedly to consider each of its moves carefully,"

nevertheless warmly approved of the reintroduction of the bill.²

It would seem, however, that some doubts may have been felt by the Government earlier in the year as to the general reaction of the people towards the bill,³ For, when the child murderer Ross was hanged in Melbourne in April of that year, the *Worker* carried a feature article advocating the abolition of capital punishment and displayed a cartoon depicting the

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2. It was the first bill formerly rejected by the Legislative Council to be reintroduced into the unicameral parliament.
3. Capital punishment had not been a public issue for some seven years.
horror of executions on its front page.\textsuperscript{1} The ground, so far as unionists and Labor supporters generally were concerned, was thus prepared for the bill.

On July 20th, the bill passed the second reading debate by a vote of 33 to 30, and the Governor's assent was received on August 1st. Once again little public interest was shown in the matter, although two hostile letters were received and published by the \textit{Courier} from H.B. Challinor, who may or may not have been a relation of H.B.M. Challinor, secretary to the police Commissioner and son of the famous Mr. Henry Challinor, a former M.L.A. He received no support from other correspondents at the time,\textsuperscript{2} however, and claimed:

"It amazes me that proper public feeling has not vindicated itself by challenging this Pollution Bill - a repudiation of Griffith's Code."\textsuperscript{3}

Strong and bitter criticism did, however, come from the \textit{Courier} and the Opposition, especially its more junior members. The \textit{Courier} ran two hostile editorials, the first of which claimed:

"Obviously the reason why the Government is in such a desperate hurry to abolish the death penalty is because the Socialist Conference, controlled by extremists, has demanded it. The people who utter treason against their country ... naturally want the extreme penalty removed. There seems to be more in this than is seen on the surface."\textsuperscript{4}

\textsuperscript{1} \textit{Courier}, 27/4/1922. The cartoon is reproduced opposite this page.
\textsuperscript{2} A correspondent, whose letters appeared in the \textit{Courier}, 12/8/22, gave passing criticism to the fact of abolition.
\textsuperscript{3} \textit{Courier}, 27/7/22.
\textsuperscript{4} \textit{Courier}, 13/7/22.
It later concluded that

"the Government has pandered to extremism on the one hand, and maudlin sentimentality on the other." 1

The importance of revenge as an element of capital punishment was also argued by the Courier which warned that, if ruthless murderers were not executed, lynch law, so common in the U.S.A., might become prevalent in Queensland. Such a fear would seem to have been groundless as lynchings had been practically unheard of in Queensland hitherto and were to remain so.

The change in attitude of the Courier from its reasoned opposition in 1916 may have been due to the facts that in 1922 there was no Upper Chamber which could be relied on to defeat the measure, and that there had been a change in its editorship. Again, hatred of the Labor Government by its opponents after "seven years of Caucusism" was greater than had been the case after the Ryan Government had been only a year in office. In view too of the Theodore Government's slim majority in Parliament, it was not unreasonable to expect that any opportunity for criticising Government legislation would be eagerly seized.

Of the Opposition members in the Assembly, only Appel, whose mind was still "fairly evenly balanced on the question", 2 made any real attempt to deal rationally with the bill. The

1. *Courier*, 24/7/22.
DIAGRAM 1: Murders known to Police in New South Wales, Queensland and New Zealand (5-year moving average)

- New South Wales (population increased about 122\%)
- Queensland (population increased about 126\%)
- New Zealand (population increased about 137\%)
X Last Execution
A Capital Punishment Abolished
CHAPTER 7
SOME AUXILIARY MATTERS OF INTEREST

Although in 1922 only cursory references were made by abolitionists to the fact that the seven-year period in which the death penalty was in unofficial abeyance, which must have been obvious to the public at large after the 1916 bill at least, did not produce any great increase in the murder rate in Queensland, such would seem to have been the case, as Table 10 and the graph¹ (opposite) indicate.

Table 10

<table>
<thead>
<tr>
<th>Period</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>Total Tried</th>
<th>Convictions as a % of Total Tried</th>
</tr>
</thead>
<tbody>
<tr>
<td>1912-14</td>
<td>9</td>
<td>4</td>
<td>13</td>
<td>69.2%</td>
</tr>
<tr>
<td>1915-17²</td>
<td>7</td>
<td>17</td>
<td>24</td>
<td>29.2%</td>
</tr>
<tr>
<td>1919-21</td>
<td>12</td>
<td>9</td>
<td>21</td>
<td>57.1%</td>
</tr>
</tbody>
</table>

The number of convictions in each three-year period is fairly constant, although the total number of murder trials shows an increase under Labor. Rather paradoxically, column (5) would tend to show that juries were less willing to convict when they knew that the death penalty would not be

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2. Unfortunately, there seems to be no available record of the Criminal Statistics for 1916, except those in the Police Commissioner’s Report, which show two convictions and five acquittals for the year 1/7/1917 to 30/6/1918.
imposed, but the low conviction rate of 1915-17 period may be explicable in terms of the general reaction of war. Juries may have been more willing to consider mitigating circumstances under the existing conditions, since the statistics for manslaughter trials in the corresponding three periods indicate an increased conviction rate for that crime during the war years. However, as previously explained, it is not possible to state how many of those convicted of manslaughter had been charged originally with murder.

<table>
<thead>
<tr>
<th>Table 11</th>
<th>Manslaughter Trials (1912-21)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
</tr>
<tr>
<td>Period</td>
<td>Convictions</td>
</tr>
<tr>
<td>1912-14</td>
<td>10</td>
</tr>
<tr>
<td>1915-17</td>
<td>10</td>
</tr>
<tr>
<td>1919-21</td>
<td>6</td>
</tr>
</tbody>
</table>

As is indicated by the graph, the murder rate underwent no rapid increase in Queensland following abolition in 1922. True there was a slight increase during the subsequent four or five years, but this was soon followed by a quite rapid decline. New South Wales, where capital punishment was still in force, experienced an increase in the mid-1920s; an increase which, unlike that in Queensland, was to continue. The proposition that capital punishment is a deterrent to murder seems to find little support from these Queensland statistics; nor did the supposed desire
by the public for revenge seem to manifest itself either through lynch law or criticism of abolition.

Prior to the split in the Labor Party in Queensland in 1957, the only non-Labor Government after 1922 was the Moore Government (1929-32) which made no overt attempts to reintroduce capital punishment. Speaking with regard to another matter, that Government's Attorney-General, McGroarty, on November 20th, 1929, told the House that the Government had no intention of altering the Criminal Code as it existed at that time. From conversations with Mr. McGroarty and his son, a practising barrister in Brisbane, it has been learnt that not only did the Moore Government have no desire to reintroduce capital punishment, but that had there been any such attempt from within the Government party, the Attorney-General, being himself a life-long opponent of capital punishment, would have strongly opposed it.

No attempts at reintroducing capital punishment appear to have been made or seriously contemplated by the present Nicklin Government, and prominent members of both the coalition parties have given assurances that none are even remotely possible. Mr. Porter, M.L.A., after saying he was certain no Liberal Party Convention in the last ten years had discussed the matter, said that he considered capital punishment "a dead issue in Queensland". No pun seems to have been intended.
Sentences Now Imposed For Once Capital Offences

As has been already explained, the mandatory sentence for treason, piracy with personal violence, attempted piracy with personal violence, wilful murder, and murder is imprisonment for life with hard labour, while such is the maximum punishment that may be awarded for rape. Several other offences, such as manslaughter, attempted murder, unlawful carnal knowledge of a girl under 12, unlawfully wounding or assaulting with intent to cause grievous bodily harm, aiding suicide, armed robbery, and arson, among others, also carry life imprisonment as the maximum punishment possible. However, it is rare, except for manslaughter and attempted murder, that such is ever inflicted as Tables 12 and 13 show. Criminals found to be insane are imprisoned during the Queen's pleasure which usually means until, if ever, they regain their sanity. Although a thorough investigation of the matter has not been undertaken, some information as to the range of punishments imposed for these offenses has been provided the writer by the Senior Assistant Crown Prosecutor, Mr. Bowder. The average sentence in rape cases would appear to be about ten years imprisonment, with brutal cases, or those in which the victim is a young child, being visited with

1. By virtue of Section 19 (5) of the Criminal Code the punishments of solitary confinement or of whipping cannot be added to any sentence for a term greater than two years unless the contrary is stipulated, as it is for armed robbery. It is understood that there is some agitation at present within the Country Party in favour of extending the scope of corporal punishment.
sentences of the order of from 14 years to life. Those where the absence of consent is, in the judge's mind, doubtful, or where the girl's conduct has been such as to induce the commission of the crime, are often punished with as little as four years imprisonment. The average sentence for manslaughter is about ten years but the range of sentence is extremely wide, with "running down" cases receiving, in general, about two years, while for those to which the new defence of diminished responsibility applies, life is not an unusual sentence. Attempted murder does not usually warrant a life sentence.

1. According to Douglas J. in R v Breckenridge (1966 Qd. R. 189 at 199). This case itself was one in which the Criminal Court of Appeal had substituted a life sentence for that of 30 years imprisonment with hard labour, which the trial judge Stable J. had imposed. In 1953, Townley J. had sentenced Watts to life imprisonment for rape committed on a 20 year old woman, but no other instances of rape being so punished in recent years have been found.
Table 12

Returns showing the Number and Nature of Indictments, and the Result of Trials Thereof in the Supreme, Circuit and District Courts of Queensland for the Years ended 30th June, 1964 and 30th June, 1965. (abridged as was relevant).

Year Ended 30/6/1964

<table>
<thead>
<tr>
<th>Offence</th>
<th>Life</th>
<th>Other Jail Term</th>
<th>Acquittal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>5</td>
<td>0</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Attempted Murder</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>1</td>
<td>6</td>
<td>9</td>
<td>26</td>
</tr>
<tr>
<td>Rape and Attempts</td>
<td>0</td>
<td>25</td>
<td>6</td>
<td>40</td>
</tr>
<tr>
<td>Assault with Intent to Cause Grievous Bodily Harm</td>
<td>1</td>
<td>22</td>
<td>25</td>
<td>84</td>
</tr>
</tbody>
</table>

Year Ended 30/6/65

<table>
<thead>
<tr>
<th>Offence</th>
<th>Life</th>
<th>Other Jail Term</th>
<th>Acquittal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>8</td>
<td>1</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>Attempted murder</td>
<td>0</td>
<td>4</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>0</td>
<td>6</td>
<td>9</td>
<td>21</td>
</tr>
<tr>
<td>Rape and Attempts</td>
<td>0</td>
<td>16</td>
<td>13</td>
<td>42</td>
</tr>
<tr>
<td>Assault with Intent to cause Grievous Bodily Harm</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

1. The fact that there may appear to be discrepancies in the total may usually be explained by the fact that there are always some False Bills filed, while others charged may be committed for trial at the next court sitting, which may not be held in the same year.

2. 22 were either fined or released on good behaviour bonds.

3. Four were released on bonds.

4. This heading covers such a wide range of assaults (some serious others not) that there is little to be gained from a detailed comparison of the punishments inflicted. It is extremely rare that even the grossest of such assaults will occasion a life sentence.
Returns Showing the Sentences being Served by Convicted Prisoners during the Years Ended 30/6/1964 and 30/6/1965. (abridged as was relevant).

<table>
<thead>
<tr>
<th>Offence</th>
<th>Life</th>
<th>20 Years</th>
<th>15-20</th>
<th>10-15</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>62</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>64</td>
</tr>
<tr>
<td>Attempted Murder</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(and three insane)</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td></td>
<td>20</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Offence</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i.e. not one of several listed – it could be arson for this was not so listed).</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Offences against females</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year Ended 30/6/1965</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offence</td>
</tr>
<tr>
<td>Murder</td>
</tr>
<tr>
<td>Attempted Murder</td>
</tr>
<tr>
<td>Manslaughter</td>
</tr>
<tr>
<td>Offences against females</td>
</tr>
</tbody>
</table>
The *Queensland Supreme Court and Punishment*

In certain Scandinavian countries, the determination of the punishment to be imposed is made by a panel of medical and welfare experts, not by the trial judge. However, the traditional English practice has been continued in Queensland as the following extract from the headnote from the report of H.V. Haselich (1967 Qd. R. 183) amply illustrates:

"The responsibility of awarding punishment once a jury has convicted a prisoner lies solely upon the judge. He has to form his view of the facts and to decide how serious the crime is that has been committed, and how severely or how leniently he should deal with the offender. In forming his view of the facts the judge must not form a view which conflicts with the verdict of the jury, but so long as he keeps within these limits, it is for him and him alone to form his judgement of the facts."

Some judges, Gibba J. is an example of such, place some importance on the reports of psychologists and social workers on the criminal awaiting sentence, but the general tendency of Queensland Supreme Court judges is to allow these but little influence on their determination of the sentence to be imposed. However, all judges do give consideration to such factors as the age of the criminal, his past conduct and way of life, the circumstances of the given case, including the actual injury or damage done by the prisoner, and

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1. See *R. v Breckenridge* (1966 Qd. R. 139) where not only was the crime of the most brutal and revolting kind, but the prisoner also had a record of two prior convictions for sexual assaults on sleeping females.
the prevalence of the particular crime within the State.¹
This, of course, leads to an extremely wide range of punishment
imposed for perpetrators of the same type of crime, a fact which
will already have been noticed.

The views of prominent members of the present
Supreme Court as to what the aims of punishment should be
seem to place but little emphasis on the idea of the
reformation of the criminal.² In R. v Watson (1960) Qd. R. 332 at
337) Nairn J. (as he then was) expressed the view that

"The all important end of justice, that punishment
should serve as a deterrent to others, demands that
in appropriate cases terms of imprisonment and
sometimes lengthy terms should be imposed."

He was in fact speaking in reference to cases of manslaughter
by negligence on the roads, but Stable J., in R. v Dabelstein
(1966 Qd. R. 411 at 434) considered the statement "as of
general application".

The opinion as to the nature and aim of punishment
held by Stable and Sanstall J.J. is clearly indicated in the
following passage by Sanstall J. in R. v Breckenbridge (1966
Qd. R. 139 at 191 and 194) when, in reference to the sentence

¹ See the judgement of Stable J. in R. v Dabelstein (1966 Qd.
R. 411 at 434).

² An exception to this generalization is Hart J., who in R. v
Bartlett (1966 Qd. R. 34) thought that both the reformatory
and deterrent aspects of punishment should be considered in
that case, which was one of dangerous driving causing death.
"In my opinion", His Honour said, "there is a fundamental
difference between a man who intends to do a wicked act and
one who offends against the law through negligence. ... sending
men who are really not criminals to mix with men who really are,
certainly does not reform them, but if their offences are
serious enough, when all the circumstances are considered,
they must be sent to goal to deter others".
imposed by the trial judge, Stable J., he says, with obvious approval:

"It is apparent that his Honour took into consideration the retributive and the deterrent factors of punishment ..., and his statutory report to this Court reveals that he was also influenced by the obvious necessity of protecting the female community from the applicant for a long time ... I am not impressed by the plea that this sentence should be upset because it goes outside the pattern of rape sentences in this State. This case presents novel and unprecedented features and the sentence must be considered on its merits. It was intended to be punitive, it was meant to deter others, and it was designed to safeguard the women and children of the community. I consider it [i.e., the sentence of 30 years imprisonment] appropriate for the very reason that its practical effect tends to make it more likely that the applicant will be imprisoned for a minimum of 15 years than would a life sentence." 1

A matter which a judge may not take into consideration in determining the severity of a sentence, however, is the power of the Governor-in-Council or the Parole Board to release the prisoner prior to the expiration of the term of punishment imposed. Accordingly the majority of the Court of Criminal Appeal in Breckenridge's case (Gibbs and Douglas JJ.) ordered that a sentence of life imprisonment should be substituted for the sentence of 30 years with hard labour imposed by Stable J. because the trial judge had imposed this sentence to prevent the Parole Board's releasing the prisoner before he had served half of his "fixed-term" sentence i.e. 15 years.

1. The following section on parole will provide an explanation of what Dunstall J. meant by this last sentence.
An indication, however, of the otherwise wide discretionary powers vested in the judge as to what circumstances he may give consideration to in determining the appropriate sentence to be imposed is seen in R. v Janny (1966 Qd. R. 323). Although holding that "it is not to be thought that a different standard of sentence is necessarily appropriate when the offender is the mother of an illegitimate child of tender years," Lucas J., with whom Gibbs and Hart J.J. agreed, added: "If the result of the sentence imposed (three years with hard labour for stealing) were that the mother would inevitably or probably lose her child (i.e. to the State, since the child could not remain with her after it had obtained the age of one year), I would regard the additional punishment thereby inflicted as unwarranted, but, as I have said, that is not the case here ...; it seems to me that the sentence was quite appropriate."

Although little fault can be found with the principles on which punishment is assessed, except for the apparent disregard for its reformative aspect, it appears doubtful to the present writer whether judges are necessarily the most suitably equipped men to decide on the appropriate form of punishment for a given case. Even with regard to the deterrent aspect of punishment, it may be noticed that a criminal who comes before the judge for sentence is evidence of a failure of

the fear of punishment as an effective deterrent. Fear at
the time the sentence is imposed may be present, but what
is needed is such a fear just prior to the committal of the
crime.

Parole

In 1937, under the Prisoners' Parole Act of that year,
the Prisoners' Parole Board of Queensland was established.
Its functions were to consider applications from prisoners and
to release on parole those prisoners whose conduct in prison
had been such as to give rise to the expectation that they
were again "fit" to return to society. This power in no way,
however, limited the exercise by the Governor in Council of the
royal prerogative of mercy. The association between the
concept of parole and reformative element of punishment is
obvious.

Originally, the Parole Board was given full power to
release on parole prisoners serving life sentences; but, under
the Offenders Probation and Parole Act of 1959, such prisoners
can be released by the Governor in Council only. This, however,
is usually done on the recommendation of the Parole Board,
which would be unlikely to make such a recommendation until at
least ten years of the sentence had been served.¹ Life sentences

1. According to a senior official of the Parole Board, the
reason for this is that, when dealing with sentences for a
fixed term, the Parole Board cannot on its own authority allow
parole until at least half of the sentence has been served.
Thus, a person sentenced to 20 years imprisonment could not
be paroled by the Board until he has served at least 10
years. It seems unreasonable then that a "lifer" should be
paroled until he had served at least that term.
tend then to mean anything from ten to 25 years, but some may be longer than this even, for "life" means exactly that in Queensland. The British Royal Commission on Capital Punishment (1949-53) was unable to obtain information from Queensland on what the average or shortest term served by "lifers" was, and nor was the present writer. But the longest term served, as of 1949, was found to be 25½ years and the man was at the time still in prison.¹ There is apparently nothing to prevent a "lifer" from immediately petitioning the Executive Council for a pardon, parole, or remission,² but such a foolhardy course is seldom taken.

When a prisoner serving a life sentence is released on parole, it is a life parole, although supervision continues for only the first five years. Thus, at any time, a breach of the parole regulations may bring about a cancellation of the parole and a return to the former life sentence. This happened on at least two occasions prior to 1949, but the general behaviour of paroled "lifers" is, not surprisingly perhaps, good. From 1939 to 1949, there had been but four subsequent convictions of paroled "lifers" for serious offences.

². Examples of remissions may be seen in Table 13 for not all murderers were serving life sentences.
Table 14
Paroled "Lifers" Subsequently Convicted of a Criminal Offence 1939–1949

<table>
<thead>
<tr>
<th>Subsequent Offences</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attempted Murder</td>
<td>Recalled to life imprisonment</td>
</tr>
<tr>
<td>Indecent dealing with a girl under 17</td>
<td>Five years imprisonment</td>
</tr>
<tr>
<td>Assault with intent to commit grievous bodily harm</td>
<td>Two and a half years and cancellation of parole</td>
</tr>
<tr>
<td>Cattle stealing</td>
<td>Five years imprisonment</td>
</tr>
</tbody>
</table>

Since the reconstruction of the Parole Board in 1959, only two of the 24 "lifers" paroled have had their paroles cancelled, both for failure to comply with one of the conditions of their parole, not for a subsequent criminal conviction.

Table 15
Return of all Parole Orders Issued from 4/9/1959 to 30/6/1967

<table>
<thead>
<tr>
<th>Issued</th>
<th>Cancelled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definite Sentence</td>
<td>203</td>
</tr>
<tr>
<td>Habitual Criminal</td>
<td>24</td>
</tr>
<tr>
<td>Life Sentence</td>
<td>24</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Paroles died while on Parole</th>
<th>Remaining Unexpired</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definite Sentence</td>
<td>4</td>
</tr>
<tr>
<td>Habitual Criminal</td>
<td>0</td>
</tr>
<tr>
<td>Life Sentence</td>
<td>2</td>
</tr>
</tbody>
</table>

3. As already mentioned, life paroles never expire.
Percentages of Cancelled Paroles, 1959–67

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definite Sentence Prisoners</td>
<td>12.8% of all such prisoners paroled</td>
</tr>
<tr>
<td>Habitual Criminals</td>
<td>62.5% of all such prisoners paroled</td>
</tr>
<tr>
<td>Life Sentence Prisoners</td>
<td>9.3% of all such prisoners paroled</td>
</tr>
</tbody>
</table>

Despite the apparent good behaviour of paroled lifers, only a small portion of such prisoners who apply each year for parole are in fact released. Of the 19 applicants last year only six were recommended by the Board for parole. That the Parole Board feels its responsibility in such cases greatly is illustrated by the following extract from its 1967 Report to Parliament:

"In the case of life sentence prisoners, serious problems have to be considered in relation to any recommendation for release made to the Governor in Council. If a prisoner is ever to be rehabilitated, it is essential that he be released before he becomes 'institutionalized', otherwise the difficulties of readjustment to the outside world after a long period of incarceration are likely to be too formidable to be overcome. However, in many cases the risk to the community in such that the Board cannot see its way clear to make any recommendation for release".

The conduct and treatment of prisoners serving life sentences is amply explained by Viscount Templewood:

1. i.e. In having the lowest parole cancellation rate of the three classes of prisoners.
"From Queensland comes the official opinion that life-sentenced men, while naturally subject to fits of depression are, in the main, by far the best class of prisoners, and that, if they prove themselves worthy to occupy trusted positions, are given personal responsibility and work on the 'Honour System'."

Certainly, the abolition of the death penalty in Queensland would appear to have done no harm, but rather to have allowed innumerable men the opportunity of making something of their lives and of making restitution to society for the wrong they have perpetrated against it, albeit in only the most humble way of returning to take a share in the responsibility for its continued advancement.

CHAPTER 8

ABOLITION AND PRESSURE GROUP ACTIVITY.

What then does the success of the movement for the abolition of capital punishment in Queensland tell about the role of pressure groups in a parliamentary democracy? In particular, can it be said that pressure groups seeking social reforms act, or ought to act, in ways different from groups having economic or selfish interests? It has usually been asserted that groups of the former type, called "attitude groups" by Potter as opposed to "sectional groups", both act in different ways and have a different type of membership and structure from economic pressure groups due to the very nature of the reform they are seeking. In this chapter it is proposed to investigate the application of this hypothesis to the abolition movement in Queensland and to ascertain how these differences, where they exist, assist or retard "attitude" groups seeking reforms such as the abolition of capital punishment.


Who Were Involved?

The first important point to notice is that there was no formal pressure group in Queensland agitating for abolition;¹ at least not unless the Labor Party itself is treated as such after the inclusion of the abolition plank in the General Programme at the 1910 Labor-in-Politics Convention. The Labor Party, however, following this inclusion, never acted as a pressure group on the various non-Labor Governments prior to 1915 from either inside parliament or on a more public level. It was content to await victory at the polls which would allow it to introduce an abolition bill into parliament. The abolition work, then, was undertaken by individuals, the most prominent being Lesina, Boote and Collings, and through their efforts such bodies as the W.P.0s, the Social Democratic Vanguard, the Worker, and finally the Labor Party itself became organs of influence for the cause of abolition.

One of the reasons for the non-appearance of a formal pressure group, such as the Howard League in Britain, may have been that, unlike Britain, Queensland had no history of such penal reform groups. Such matters had traditionally been left in the hands of the Government, which in turn took the lead almost exclusively from the Judiciary. In nineteenth

¹. As previously mentioned, an Anti-Capital Punishment League was set up in 1909 following the public awareness in the matter aroused by the Ross case, but it made no lasting impact and appears to have disintegrated following Ross's execution.
century Queensland it would have been unthinkable to have seriously contemplated any reform in fields over which the Judiciary claimed and exercised authority, unless it had not only met with judicial approval but also had originated from within the ranks of the legal profession. Especially was this the case as regards penal and criminal reform. The two previous Acts affecting capital punishment in Queensland, the Offences Against the Person Act, and the Criminal Code Act were each the product of the work of the currently presiding Chief Justice, a fact which the respective Attorneys-General (Pring and Rutledge) clearly believed was of extreme importance, as is indicated by their Second Reading speeches in the Legislative Assembly. Apart from the Labor M.L.As in 1899, parliamentarians, like the Governments, never appeared to question the conclusiveness of the Judiciary's opinion in such matters. Both parliamentarians and the public, when such matters as capital punishment were raised either in parliament or publicly, would, of course, express their opinions, but, if left alone, they were generally content to leave such matters to the self-professed experts. This factor may well have been responsible for both the public's general lack of interest in abolition during the parliamentary debates on the 1916 and 1922 bills and for the fact that only

1. Although it extended to such administrative matters as the question of the Government's right to appoint officers of the Supreme Court without the Judiciary's prior consent and the use of shorthand writers in Court, as well as to more truly legal matters.
limited appeal was made by abolitionists to the public for their support in the years preceding Labor's election victory in 1915.

Another reason for the absence of a formal group no doubt lies in the nature of the reform sought. When self-interest is involved in an issue not only are more people likely to become involved in it, but they are also more likely to be prepared to expend large sums of money in order to ensure the venture has the best chances of success.

By not having a formally organized group, abolitionists no doubt suffered certain disadvantages. Unlike their contemporaries in Britain since the Second World War, they had no means of co-ordinating appeals for support to the public or parliament, nor did they have a reservoir of statistical information with which to add support to their case. The National Council for the Abolition of Capital Punishment and the Howard League collectively provided both in Britain. However, this had but little adverse effect on the Queensland movement, for, in the main, it was to neither the public nor to parliament that the abolitionists turned but rather to the Labor Movement, and here the personalities of the leading abolitionists and their respective influences within the movement were of chief importance. Neither was the absence of statistical research of great moment, for arguments based on the opinions of European criminologists and on moral grounds, when placed in an idealistic and socialistic framework,
proved quite sufficient to convert Labor Party opinion, while the statistical evidence needed to impress those emotionally committed to capital punishment (given that statistically based arguments can ever accomplish this)\(^1\) would have been far beyond the capabilities of even the most well-organized pressure group in early twentieth century Queensland. No major statistical work of this kind was undertaken even in Britain until the mid-1920s.\(^2\)

Indeed, it may be argued that the absence of a formal pressure group proved advantageous to the abolitionists, for the existence of such groups almost inevitably creates organized opposition. Not only can such opposition make it more difficult to obtain whole-hearted government or party support;\(^3\) but it also forces the contest into the public arena. It will be argued later that it is not to the advantage of the abolition groups to engage in a struggle for public support. Such appeals are based chiefly on emotion, and it is submitted that, in a conflict between raw emotions, the desire for revenge is still likely to be greater than that

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1. Speaking in the House of Commons in 1948 on Silverman's abolition amendment to the Criminal Justice Bill, Sir Patrick Spens said: "I am absolutely convinced - I know - that fear of violent death is a deterrent, and no statistics, no arguments whatever, will convince me that it is not." Christoph, *op. cit.*, p. 136.
2. In 1927, Calvert's *Capital Punishment in the Twentieth Century*, the first "systematically organized body of criminal statistics" was published in Britain. Christoph, *op. cit.*, p. 31.
3. As was the case of the temperance bodies which during this same period were unable to win complete intra Labor Party support because of the counter pressure being applied to the party by the Queensland Licensed Victualler's Association.
Another important feature of the abolition movement in Queensland was the entire absence of co-ordinated or influential opposition groups. In Britain, the efforts of abolitionists in 1948 and the mid-1950s brought strong retentionist replies not only from the Conservative Party organizations and its allied "Ladies' Groups", but also from the Home Office, the London Police Union, various county Watch Committees, prison officials, and the Judiciary, as well as from the House of Lords, and the majority of Tory M.P.s. In Queensland the only opposition to abolition, apart from that inside parliament, came from the non-Labor press. With these other potential opposition groups silent, the abolitionists were able to concentrate on winning intra-Labor Party support, attempting to win public support only when conditions, such as the impending execution of persons (such as Ross or Patrick Keniff) for whom sympathy existed or could be created, best suited their chances of success.

At What Levels did Abolitionists Work?

It is customary for groups seeking to gain acceptance for their views to bring "influence to bear at whatever point decisions are made affecting the group('s) interest." The actions are also determined largely by the opportunity they have of gaining access to various people engaged in the process of government. The first consideration will obviously depend on the nature of the aim of the group. Economic pressure

groups will most often find it necessary to deal directly with the particular Government Department or Minister responsible for administering policy in the region with which the group is concerned. When such groups seek the introduction or non-introduction of new legislation, it may often be necessary to make overtures directly to the Government, or to back-bench or Opposition Members of the Legislature. But even then it will be to their advantage if the particular Department concerned is brought "on side" with the views of the group. It is only when all else fails that they are forced to seek public support - a task which is often extremely costly and seldom all that helpful to their cause. Of course, public support may be useful to a group in its attempt to convince a government or party of the desirability of advancing the group's interest, and so resort may be had to the public before the alternative avenues have failed. If, however, public support is unlikely, little would seem to be gained, and indeed much (both by way of money and influence) may be lost, if this support is not forthcoming. While the formal channels are open to it, appeals to the public by a pressure group are extremely risky affairs.

Why the above reasoning should not apply to non-economic or "attitude" groups is not quite clear to the present writer. Certainly such groups may be more limited than these other groups in that, usually, the reform they are seeking will require legislative, as distinct from administrative, action, and there will seldom be any scope
for compromise either between conflicting groups or between one group and the Government. But this does not alter the fact that it may still be possible to seek to influence the Department administering the existing law or policy in regard to the group's field of interest, as well as seeking Governmental, back-bench, or Opposition support in the Legislature should the group be desirous of effecting a change in the existing law. Once again, unless public support is highly probable or there is an already existing public opposition which is adversely affecting the group's chances of success at the Administrative and Legislative levels, it would seem to be wise for the group not to seek such support unless and until success at other levels is not, or appears unlikely to be, forthcoming. It shall later be argued that for abolitionist groups it is especially unwise to place too much emphasis on gaining public support.

Although this does not apply to "attitude" groups which, like the Howard League, seek long-term and continuing reforms, it is submitted the single purpose "attitude" groups, such as those seeking the abolition of capital punishment simplicity, have an advantage over most economic

1. For instance the introduction of degrees of murder with only certain types continuing to carry the death penalty into British criminal law under the Homicide Act of 1957 was really unacceptable to both the abolitionist and the retentionist camps. In economic matters compromise is often all that can be achieved.
pressure groups in that they may become openly partisan with less risk of meeting with retaliatory treatment at the hands of a subsequent Government. Once successful, their battle, except in rare instances, is virtually over. Such is obviously not the case with economic pressure groups and bodies such as the Howard League. Further consideration shall also be given to this point later in the Chapter.

The Queensland proponents of abolition could, then, have directed their attention to some or all of the following bodies whose support would have been of varying benefit to their cause: the Home Secretary and the Administrative heads of his Department, the Government, the Legislature, any or all of the political parties, the Judiciary and the public.¹ All these avenues, except the Judiciary, were canvassed to varying degrees, with the chief emphasis being placed on the Labor Party, working through both the rank and file membership and, to a lesser and certainly less successful degree, the M.P.'s.

1. As previously mentioned (in Chapter one) the Governor, well before 1900, appeared no longer to have had in practice any power to grant the commutation of a death sentence contrary to the wishes of his Cabinet. At no stage since December, 1859 at least would he have been able actually to abolish capital punishment. The fact that a deputation, seeking a commutation of a death sentence, waited on the Governor as late as 1909 may probably be explained as merely an additional way of attempting to force the Kidston Government to spare Ross's life and, more particularly, of creating further public interest and involvement in the issue, rather than an attempt to use the position of Governor as an Executive institution per se, through which Administrative decisions might be directly affected. Thus, the Governor has been excluded from this list. Even if his personal support could be secured on such an issue, it is submitted that, in the presence of Government opposition to the measure, it would be constitutionally improper for him to air his opinion publicly.
The reason for the emphasis being placed so much on working from within the Labor Party was no doubt due, together with the failures experienced by the abolitionists at the other levels, to the fact that the three principal proponents of abolition were members of the Party, and were strongly convinced socialists as well. Obviously one can be most influential where one has access and where one is treated with some degree of respect. All three leading abolitionists by virtue of their positions, had potential influence within the Labor Movement and, although this is less true in Lesina's case, all could expect to be listened to by Party members.

Boote as editor of the *Worker*, had command of the Party's chief propaganda and persuasion organ as regards rank and file members, while Collins held various positions of influence in metropolitan W.P.Os, the Social Democratic Vanguard, and the C.P.E. Later he was to be the Party's State Organiser.

The fact that the abolitionists were less successful with the P.L.P. may in part be due to the fact that the far from popular Lesina was less influential there than his fellow abolitionists were in the non-parliamentary wing of the party. But before dealing with this aspect of the abolitionist campaign, brief reference shall be made to their attempts at gaining support at other levels.

**Abolition and Parliament**

The first real attempt at securing the abolition of capital punishment in Queensland came in 1899 with Lesina's
Amendment to the Criminal Code Bill. His lack of success in gaining either Labor or non-Labor member's support could scarcely have given abolitionists much hope of achieving their desired reform in this way. However, Lesina, alone it would seem, continued to seek support from his fellow members. By December 1902, he seems to have managed to obtain at least some private support for his position, but when he began his public campaign on behalf of the Kenniffs no other M.P. came forward in support of either abolition or the reprieve of the particular men condemned to death. But, due probably to the effects of public and Labor rank and file support, the position was reached in 1904 where the leader of the P.L.P., Kerr, could be goaded into admitting Labor's opposition to capital punishment. However, this phase was to prove but transient. The adverse publicity caused by the commutation of the death sentences on the Macdonalds, a decision which the Labor Party was blamed by the Opposition and the Courier for forcing on the Morgan Government, and Kidston's personal support for capital punishment were of greater influence on the P.L.P. than was Lesina. By the time that abolition had been adopted by the Labor Convention as a recommendation to the P.L.P.¹, the majority of these parliamentarians had left the Party to follow Kidston. Parliament then never proved of much benefit to the cause of abolition. Non-Labor members

¹. That is in 1907.
at no stage, except for Appell, M.L.A., and Dr. Taylor, M.L.C., during the debate on the 1916 bill, gave occasion for abolitionists to expect to benefit from soliciting their aid. **Abolition and the Executive**

Given the reaction of non-Labor M.Ps in 1899 to the idea of abolition, and their continued hostility to it right up until the passing of the bill in 1922, it is little wonder that few attempts were made at gaining Governmental support for abolition. Nevertheless, attempts were made at securing the commutation of death sentences passed on certain criminals - Ross, the Macdonalds, and the Kinnells in particular. Such attempts (except in the case of the Macdonalds) were, however, undertaken not so much with the hope of securing a change in administration of policy regarding decisions on whether or not to execute, as with the hope of gaining public support for, or at least to lessen its resistance to, abolition.

Even had the abolitionists succeeded in securing a complete suspension of capital punishment, ¹ it would have been necessary at some later stage to have won the support of a majority in the Legislature in order to have achieved a

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¹. As was the position throughout Labor's term of office prior to the reintroduction of the capital punishment bill in 1922, following the abolition of the Legislative Council, which in 1916 had proved to be a stumbling-block to legislative reform in this matter.
reasonably secure victory. The position in Victoria today is clear evidence of the fact that the administrative policy of one Government as regards an issue such as capital punishment will not necessarily continue under a subsequent one. Where abolition is given legislative effect however, the probability is that capital punishment will not be reintroduced by a subsequent government unless there has been a serious increase in the number of murders or crimes involving armed violence.¹

The reason for this is probably two-fold. Firstly, to induce change one has to provide a reason. Abolitionists may appeal to statistics in order to show the absence of the deterrent effect of capital punishment and to sentiment or emotion, while those seeking to reintroduce capital punishment are forced to rely almost solely on the alleged proof of the deterrent aspect, for, even though it may be the true reason for seeking the reintroduction or retention of capital punishment, one does not like publicly to proclaim a great desire for vengeance. Secondly, opponents of abolition are generally conservatives. Once abolition has become accepted in a community (for example, as it is in Queensland at present) it would be quite a radical act to attempt to reintroduce the death penalty, and as such would hardly be expected from a conservative government, unless justified by an increasing murder rate.

¹ As happened in New Zealand.
Whether attempts were made at seeking government support for abolition or for a reduction in the severity of the application of the death penalty following the coming to power of the Denham Government is unknown. Certainly the execution rate fell during this period, but this may have been due to the public discontent aroused by the hanging of Ross in 1909 and to the attitudes towards punishment held by various members of Denham's Cabinet – Home Secretary Appall in particular. If abolitionists did seek a reduction in the execution rate, both their attempts and the measure of their success (if any) was not made public. Indeed, after the successful (so far as enlisting public support was concerned) campaign on behalf of Ross, there were no further public appeals made by the abolitionists on behalf of condemned men. It is suggested that the reason for this was that such campaigns were aimed at the public and not really at persuading the Government. Following the 1909 attempt, it is unlikely that additional public support could have been gained (and the risk of losing the existing approval or acquiescence would have been fairly appreciable), while the possibility of altering the position of the Kidston Government was obviously slim. By 1911, not only had abolition been adopted by the Labor Party (and with this came a general decline in the ardour of abolitionists, for victory then must have seemed to be only a matter of time), but the attitude of the Denham Government was probably as good as abolitionists could hope for,
short of abolition. Attempts to gain more from such a Government might have served only to worsen the position, especially if such attempts were made public. Probably, then, such attempts were not made.

Appeals to the Public

The chief danger accompanying appeals to the public is that failure can do the cause much harm and it is often difficult to anticipate what the chances of winning support are prior to beginning the campaign. A group aiming at a reform like abolition will have a harder task in this respect than those seeking economic reform for its appeal can be based only on statistical argument and emotion, not on self interest. As has already been mentioned, the emotional arguments probably favour retentionists, while those based on statistics will be extremely difficult to transmit to such a large and diverse audience as the general public. The Queensland abolitionists were faced with the additional difficulty (not now so serious for abolitionists to overcome) in that they had no reliable criminal statistics on which to base a reasoned argument against capital punishment's supposed deterrent effect.

Again, unlike most producer or consumer orientated pressure groups, abolition groups are dealing with factors that operate independently of their control or influence. They may hope that the murder rate will fall, or at least not rise, after abolition, but until then they have no
way of influencing it. Thus, the perpetration of a particularly heinous crime may occur at any time, and may completely destroy the work done by the group in wooing public support for abolition. This happened in Britain in the immediate post-war period. On the other hand, the execution of a criminal whose guilt is in some question, or who has aroused public sympathy because of (say) his youth, or low mentality, may win at least temporary public support for abolition. If the abolition group has plunged head-long into the task of winning public support, or has been forced so to do because of the support forthcoming to rival retentionists groups, it must bear the consequences of whatever type of murder or murderer that comes along. Luck, thus, may play an extremely important part in the campaign. In the 1950s, luck favoured the British abolitionists by virtue of the cases of Bentley, Christie, Evans, and Ellis; in the late 1940s it had worked against them. By keeping out of the public arena, however, the Queensland abolitionists were able to choose the cases on which to base their appeals to the public, and to allow to pass those cases, such as Warton's, the Macdonald's, and Austin's, which could only have served, as the Macdonald's did anyway, to depreciate their cause in the eyes of the public.

Luck, however, still played its part, for not only did two such ideal cases, from the point of view of abolitionists desirous of winning public support, as those
of Ross and the Kenniffs take place in Queensland during the relevant period, but they were also handled by the respective governments in ways that could scarcely have been better calculated to assist the cause of abolition. Speaking of the previously mentioned cases in Britain in the 1950s, Christoph concluded:

"It is not difficult to believe that had the several Home Secretaries chosen the other alternatives open to them in each of these cases, the subsequent success of the abolitionists would not have come about." 1

While not contemplating giving such a role of importance to the two Queensland cases, it is certain that these two executions did much to assist abolitionists in gaining not only support from the public but also from Labor rank and file members. 2 The Ross case also brought, if not support for complete abolition, at least a certain sympathy for the cause from the churches and the professions. Ross's death certainly must have tended to make potentially anti-abolition groups, such as the Police and Prisons Departments and the Judiciary, less likely to oppose abolition. The absence of such opposition has already been remarked upon.

Of course, it may not always be possible, because of either the presence of strong retentionist groups, or the

2. Especially did the Kenniff's case do this.
failure to win support at one of the other levels (such as party, government etc.) at which pressure may be applied, or the fact that the press or other mass media have learnt of these attempts and have relayed the information to the public, to keep the question of abolition from becoming a matter of great public moment. However, the fact remains that the Queensland abolitionists were so able, using only the most promising opportunities on which to base their public appeals. Except for the occasional indiscretions on the part of Collings in writing to the Courier on the occasions of the executions of Warton and the two Kanakas, the abolitionists gave their critics, such as the Courier, almost no valid opportunities for labelling them as "maudlin sentimentalists." The fact that such remarks were made with regard to those agitating on behalf of Ross and the Kenniffs may well have done much to destroy the effect thereafter of such name-calling. Certainly, the Opposition's and the Courier's use of this smear in 1916 and 1922 appeared to have no success in arousing public antagonism to abolition.

Rather than attempt to win outright public support, the abolitionists were content, and were allowed by their opponents, to render it passive. Such was certainly sufficient, given that they had the support of a party with such an election winning potential as the Labor Party.
Abolition and the Labor Party

In view of the ideology of the three principal abolitionists (Lesina, Boote and Collings), their respective potential for influence within the Labor Party, the fact that what support for abolition that was forthcoming from parliamentarians had come from those belonging to the Labor Party and indeed the abolitionists saw their cause in socialistic terms, the acceptance by the Labor-in-Politics Convention of 1905 of the "socialist objective", and the fact that the nature of the Kenniff's case (the first case to really incite a degree of wide-spread toleration for, if not acceptance of, abolitionists ideas) was such as to arouse the feelings of Labor and potential Labor supporters - the bushmen, the small farmers, and the Roman Catholics - it is not really surprising that abolition should have become a partisan matter to the extent that it received adoption to the General Programme of the Labor Party. This tendency towards abolition's becoming a party matter was also assisted by the strong opposition which abolitionists faced.

1. That is, that crime was a product of the capitalist society; therefore, the criminal was not so much to blame as was his environment; what was needed was to change the class structure of society (this lessening crime) and to rehabilitate the criminal. Capital punishment is, of course, incompatible with rehabilitation. Not only did the fact of placing the blame on society, rather than the individual reduce tendencies for the desire of vengeance on murderers but approval of abolition also seemed to follow fairly automatically from expressions of such ideals as pacifism and "international brotherhood".
experienced from the non-Labor parties.

After considering the reluctance of both major British parties to take a definite stand on capital punishment in 1948 and the mid-1950s, Christoph concluded:

"moral questions such as capital punishment have an uncertain relationship to the central body of doctrines held by each of the parties and, in the eyes of the parties chief strategists, are politically unrewarding."¹

Nothing, however, can be further from the truth as regards the position of the Labor Party in Queensland in the early years of the present century. Far from having an "uncertain relationship" to the party's "central body of doctrine", such issues were part of its general socialist objective. To the idealistic socialist of the Labor Party at this time, moral, social, and ethical questions were probably of as much importance as the more typically political ones affecting economic and industrial matters. In addition to the abolitionists, the Labor Party at this time attracted to its ranks proponents of social reforms less obviously connected, or capable of connection, with socialism; such as groups desiring liquor prohibition (e.g. the International Order of Good Templars), the abolition (and later the re-introduction) of the Contagious Disease Act, and the raising of the age of consent to 18 (e.g. certain members of the

¹ Christoph, op. cit., p. 173.
Y.W.C.A. sought and secured the adoption of this plank to the Labor Party's platform. There was no question of the Labor Party's being reluctant to take a stand on such moral issues; indeed it seems almost to have considered such to be its duty if it was serious in its avowed aim of creating a new and better society. The same seems to be generally true of the Labor Parties in the other Australian States, for abolition was adopted to their respective platforms at about the same time as it was in Queensland.

The advantages for abolitionists of having united party and later government support for their proposed reform were obviously great. Not only did it ensure that were the issue ever raised in Parliament or public, it would have fairly large and not altogether uninfluential

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1. Not all "attitude" groups had success as complete as that of the abolitionists though. The temperance bodies, for example, could secure the adoption of only the most vague prohibition plank, and, after Labor came to Office, they were unable to secure legislative action on the matter. Unlike the abolitionists, however, they had roused the opposition of a large and wealthy economic pressure group, the Queensland Licensed Victualler's Association, which also sought to work through the Labor Party, both at the P.L.P. and W.P.O. levels. This fact largely accounted for the comparative temperance failure, as compared with abolitionist success.

2. It has not proved possible to ascertain the exact dates of the various adoptions, but the Premier of South Australia has informed the writer that abolition has been in that State's Labor Party platform "for over 50 years"—Dunstan to the writer, 29/8/1967.
support, but also that, should the party be successful at the elections, the measure could be introduced into parliament as a Government bill thus ensuring its success in the Legislative Assembly at least. The chief difficulty faced by the abolitionists in Britain in 1948 and mid-1950s was that they never secured the support of any Government. Even though in 1948 there was a Labour Government and the abolitionists had the support of the vast majority of Labour P.M.s, the fact that the bill was not adopted by the Government but a "free vote" allowed on it in the House of Commons not only made its passage through that House extremely hazardous, but also allowed the Lords a greater opportunity for rejecting it, in that such action could not be used by opponents of that House as further evidence of the Lords obstructing the wishes of the popularly elected Government.

An additional advantage of having Government support for a measure such as abolition is that, if the proposed legislation is rejected by the Upper House, administrative action can still be taken to ensure that, for the duration of the existing Government at least, all death sentences are in fact commuted by the Home Secretary. This is exactly what happened in Queensland after the first abolition bill was defeated in the Legislative Council in 1916. Although only a temporary measure, it was certainly preferable, from an abolitionists' stand point, to a
continuation of executions, as was the case in Britain following the 1948 and 1956 rejections of abolition bills by the House of Lords.

The Queensland abolitionists, unlike their British counterparts who "in order to achieve their goal needed the positive backing of the leaders of the political party in power (which) they never got,"¹ did succeed in getting the "positive backing" of a party with good election winning potential, and with this came success.² This success was due chiefly to the fact that the abolitionists were able to have access to, and had much influence over, both the Labor Party leaders and the policy-making and administrating bodies of the party - the W.P.Os, the Labor-in-Politics Conventions, and the C.P.E.

Luck, of course, played a considerable part in assisting them in this respect. It seems more than mere speculation

2. Indeed, although the writer has been unable to investigate the matter fully much the same would appear to have happened in Britain in 1965, when the Wilson Government facilitated and gave unofficial support to Silverman's bill to suspend the carrying out of the death penalty for five years passed through both Houses of Parliament (although the traditional "free-vote" on private member's bills dealing with "matters of conscience" was still adhered to). The method of securing Party support by appeals to the public and back-benchers would seem then to be capable of success, albeit the time taken in achieving the desired goal may be great.
to say that without the three leaders they had, the abolitionists may have found the going much more difficult and their trek much longer before the end of their journey in quest of abolition was reached. They had, through Boote, the use of the *Worker* as an organ for abolitionist propaganda (propaganda which began as early as 1902, just three years after Lesina's lone stand on the issue in parliament); a man like Collings who was involved in, and had much influence over, so many rank and file organizations in which he had the opportunity to win support for abolition at the grass-roots level of the Labor Party; and a fiery M.L.A. in Lesina, who appeared to have quite substantial influence over his Clermont electorate, and who was generally well received in most of the country districts he visited during his quite frequent "speaking tours".

Nevertheless, given these slices of fortune, they put them to the best possible use and kept their eyes steadfastly on the major objective - winning sufficient Labor Party support to have abolition adopted to the Party's platform.

Once this was achieved, and following Labor's victory in the 1915 election, the influence of Collings from within the C.P.E. and later as State Organizer and of Fihelly, Pollock, and Larcombe from within the P.L.P., together with the absence of any public or official opposition to the measure, was sufficient to ensure legislative recognition being given to abolition. The
abolition of the Legislative Council in 1921 saw the removal of the last remaining obstacle to abolition. The question of abolition, however, had virtually nothing to do with the end of that Chamber. The Council's rejection of the 1916 bill was not used by either side in the struggle between the Labor Government and the Upper House; the chief reason being that neither could reasonably claim that it had acted in accord with public opinion. Also, although the plank had been in their platform at the successful 1915, 1918, and 1921 elections and, thus, it could have been argued that public endorsement of abolition had been obtained, the Labor Party was content to allow public interest in abolition to remain low. Had the Legislative Council not eventually been removed, however, appeal for public support may have become necessary.

The Judiciary

Students of politics, when dealing with systems of Government of the British parliamentary democracy type, perhaps tend to place too little importance on the role the Judiciary played, or may have played, in the decision-making process. The reason for this is no doubt due to the acceptance of the idea that the Judiciary is above and free from political involvement. Such anyway is the theory, and so preferable may it seem to the position

1. The House of Lords was able to make this claim in both 1948 and 1956.
existing in countries such as the U.S.A. that the assumption that the theory is strictly adhered to in practice may not be made liable to closer investigation as often as it perhaps should be. It may well be then that overtures were made by abolitionists to the Queensland Judiciary in order, if not to attempt to win their support for abolition, at least to "sound" their likely reaction to its introduction. If either of such took place, strenuous attempts would no doubt have been made to prevent it becoming public knowledge. Certainly little in the way of evidence has been found by the present writer to indicate that this did in fact take place.

However, unlike the British Judiciary in both 1943 and 1956 (and some of them still in 1965) their Queensland counterparts never made public any objection they may have had to abolition, and Real J. and various leading barristers (such as Blair, later to be Chief Justice) gave indications of at least not being opposed to the measure. But this would seem to have been due more to their own temperaments than to the possibility of their being "persuaded" by the abolitionists.

1. Lord Denning for instance.

2. As mentioned previously, they were not slow to criticize other government actions (whether legislative or administrative) which did not meet with their approval, whether they directly affected the Judiciary or not.
It is submitted, however, that groups seeking reforms such as the abolition of capital and corporal punishment can lose nothing, and may benefit much, by approaching members of the Judiciary and attempting to win their support for the proposed reform. Even given, as may well be no longer the case, that judges tend to be of conservative dispositions, careful arguments based on the vast statistical information that abolition groups now have at their disposal may well have more effect on judges than on politicians. The latter have the opinions of their electorate and party to consider in order that their own political careers may not be placed in jeopardy, the former have no such extraneous matters likely to effect their assessment of the merits of the abolitionist's case. If the Judiciary can be won over to the abolitionist's camp, even if this does not mean increased voting power for them in the Upper House as would be the case in Britain, the favourable effect of such support on public, government, party and individual parliamentarian opinion may well be substantial. This is an avenue which, at least in systems of government with Judiciaries adhering to British traditions, is not open to economic pressure groups. Even if it were open, the effect of Judicial approval for an economic proposal would probably be far less weighty in the eyes of the public and parliamentarians because of the suspicion that self-interest, not validity of argument, had provided the reason for the proposal receiving support.
The Advantages and Disadvantages Possessed and Faced by Single Purpose "Attitude" Groups and How They Should Seek their Goal.

It should be noted at once that this discussion deals only with those "attitude" groups which aim at a single goal, (thus excluding groups like the Howard League or OPAL) and with abolitionist groups in particular. Although some of what is said may be equally applicable to these other types of "attitude" groups, and even to "sectional" and economic pressure groups.

These groups then are usually small in membership, finances, and influence (whether economic, social, or political - particularly in terms of voting potential). These factors may be said to stem from the one source; namely that the group's goal is not one the adoption of which will provide material benefit to its proponents. Groups with sectional or economic aims, thus, provide greater material inducement to potential members than do "attitude" groups. This lack of numerical support for "attitude" groups leads, in general, to the lower degree of finance, influence, and prestige accruing to these groups. These factors may be lessened somewhat by the inclusion within the ranks of such groups of prominent, wealthy, or

1. It can not be seriously argued that (for example) potential murderers join abolitionist groups.
influential men and women; but such will do little to overcome a group’s low election-swinging potentials. Money and man-power as well as prestige are important for research purposes and for public publicity campaigns, but the latter is not at all vital for abolitionist groups.

Other features of such groups are that it has no way of controlling its subject matter, nor can it seriously threaten to withhold its services from the Government in order to secure acceptance of its proposal by coercion. All it can do is try to make the best use it can of such accidental and uncontrollable happenings (such as the execution of a man whose guilt or sanity is in some question) that may benefit its cause and to play down, and attempt to allow to pass unnoticed, events (such as the murder of a young child) which can arouse public desires for vengeance and do its cause great harm. It will have more chance of choosing when to highlight and when to play down such accidental happenings if it has not committed itself to a full-scale battle for public support.

1. Such people as Benjamin Britten, J.B. Priestley and Dame Edith Sitwell added prestige and respectability to the British abolition campaign of 1955-7, while popular figures in Barry Jones and Frank Sedgman added to the popularity of the abolitionists' campaign on behalf of Tait in Melbourne in 1961.

2. E.g. abolitionists have no way of controlling the murder rate or of preventing a particularly heinous crime from taking place and destroying the support that has been built up in the public, parliament, or government for abolition.
Such a group's lack of economic and political pressure potential may also serve as a benefit, in that the aim of such a group is less likely to threaten the interests of large economic and influential groups in society. Without the opposition of such groups, its own weaknesses in the areas where these groups are likely to be strong\(^1\) are less likely to prove detrimental to the "attitude" group. Also, the absence of opposition will make it easier for the group to remain uncommitted to a campaign for public support. This was the case with the Queensland abolition movement. The temperance bodies were less successful for their activity threatened the interest of the licensed victuallers. The fact that the Queensland abolitionists did not form a large organized pressure group, as compared to their British counterparts, also helped to minimise the formation of retentionist opposition from the Police and Prisons Departments and the public in general, as was the case in Britain. However, if statistical knowledge is required to support their case, abolitionists must, now that such information is obtainable, form themselves into some kind of a formal group. This must probably also be done in order to win government or party support. Individual action did more in Queensland than can be reasonably expected from

\(^1\) Such as voting potential and economic power.
such an arrangement under present conditions.

Generally, single purpose "attitude groups", and certainly abolitionist groups, will eventually require legislative recognition for their proposals if they are to be able to consider their efforts successful. However, the fact remains that support at administrative levels can be advantageous to them. In the case of abolition, if the Home Secretary can be persuaded to commute all death penalties during a certain "trial period", or if, as was the case in Queensland, and is at present the position in South Australia, the Government, though unable to secure the passage of an abolition bill, can be persuaded to put capital punishment into abeyance, then not only is this at least a partial victory for the group but also, if its claim about the absence of any great deterrent value of capital punishment are, as it obviously believes to be the case, correct, an opportunity for this claim to be proven is provided. Again, if capital punishment remains long enough in disuse, it becomes less likely that any subsequent government will revive hangings, unless some particularly heinous murder takes place.¹

¹ For instance, there has been no execution in Tasmania since 1946 and, it is submitted that even were there to be a change of government in that State the probability of capital punishment being reintroduced there is not high. Such is not altogether impossible, however, for Western Australia has returned to the retentionist fold despite its experience of a 20 year period (1932-1952) in which no executions were carried out.
Thus, "attitude" groups are not really limited to a very much greater extent than are sectional and economic pressure groups as regards the way they may seek support for and the adoption of their proposals. Indeed, as has been mentioned, they may have the additional advantage of being able to seek the support, or at least acquiescence of the Judiciary. Although they may find greater difficulty in enlisting individual and organizational support than do sectional groups because of their more limited economic and political resources, once support has been given to "attitude" groups it is likely to be of more value to them than support of sectional groups is, because there can be little suggestion of it having been bought for a *quid pro quo*.

Two additional points which distinguish single purpose "attitude" groups from other types of pressure groups are, firstly that the former can afford, and may well find it necessary, to become partisan, and secondly, (and this applies particularly to abolition groups) that resort should be made to appeals for public support only when strictly necessary. This will usually be either when all other lines adopted seem to be fruitless or when the particular circumstances of an execution or trial are such as are likely to strongly favour the case of abolition.

Partisanship

Groups whose aims are multiple or whose goals must
be achieved in gradual stages may obviously suffer at
the hands of a subsequent government if they allow
themselves to become too blatantly partisan. However,
this does not apply to groups which cease to function once
their single goal has been reached. Also, since such groups
will usually be aiming ultimately at legislative action, they
will need to have the support of a majority within the
Legislature. Again, if they wish to avoid the difficult
task of securing the successful passage of Private Member's
bill in both Houses of Parliament against the wishes of the
government, \textsuperscript{1} it will be necessary also to secure government
support. All of this points to the fact that such a group
may well benefit from becoming partisan. It is extremely
doubtful if the Queensland abolitionists could have secured
such a swift victory, or indeed any kind of victory, without
allowing the Labor Party to champion the issue.

However, if one's support is coming from the Opposition,
and it appears probable that such is likely to remain the
status of that party for some time, the partisan nature of
the group may render the likelihood of the group securing

\textsuperscript{1} Such a bill failed twice in Britain (in 1948 and
1956) and bills introduced in South Australia and
Victoria during the Stuart and Tait cases fared no
better, although in these last two cases abolitionists
also failed to gain the support of a majority of the
members of the respective State's Lower Houses.
sufficient Government back-bench support for a private
member's bill almost negligible. 1 Any existing back-bench
support will, almost certainly be lost, once the group has
become openly partisan as happened to the temperance bodies
seeking 6.00 p.m. closing in Queensland during the Great War. 2

Appeals to the Public

Apart from what has previously been said on this matter
there is a further reason, however, why it may well be
especially disadvantageous for abolitionists to appeal
to the public for support. Their appeal can be based on
either (or both) emotion or fact. However it is difficult
to formulate a clear-cut and simple argument for the abolition
of capital punishment based on statistical research, such
as would be suitable for use in a public campaign. Reasoned
argument is more effective, and indeed has been so, 3 at the
personal level, while public campaigns must depend chiefly on
the appeal to emotion.

1. Such may well be the situation at present in Victoria,
where the abolition of capital punishment has A.L.P.
parliamentary support, but where there seems little
indication of similar support coming from back-bench,
Liberal, Country Party, or D.L.P. members.

2. R. Barber, "The Issue of Six O'Clock Closing in Queensland
During the Great War", Seminar Paper, University of

3. For example, Sir Ernest Gowers, who at the time of his
appointment as Chairman of the Royal Commission on Capital
Punishment in 1949 favoured the death penalty, was
converted to the abolitionist camp as a result of the
research undertaken by the Royal Commission.
- Ernest Gowers, A Life for a Life ? Victor Gollancz Ltd.,
It is here, in the present writer's opinion, that abolitionists are at a disadvantage vis à vis the retentionists. Perhaps because they are themselves likely to be idealists, abolitionists tend to expect that humanist feelings for one's fellow men will be stronger within the community as a whole than will the more primitive, less light-minded desire for vengeance against the calculating or brutal murderer. But such, it is submitted, is not the case. This contention is based on the fact that not once has the present writer seen the result of a public opinion poll which has given abolitionists a majority over retentionists. The reason for this strong retentionist opinion may be due to feelings of self-interest (i.e. the need for protection from murderers), raw desire for vengeance (perhaps as an outlet for pent-up emotions), or to conservatism (a clinging to such an old social tradition as hanging); but whatever the case, the forces seem to be attacked against groups seeking support for the cause of abolition.

But is it possible to prevent abolition from becoming a matter of public interest? Christoph would appear to think not, as is indicated by the following passage:

"Emotional issues are likely to be 'popular' issues in the sense that the layman feels at home with them and competent to pronounce upon them. They evoke widespread public interest ... As the polls indicated, few Britons were without opinions at any stage of the controversy, irrespective of the amount or accuracy of the information they possessed ... Everything pointed to the fact that the capital punishment controversy had a particularly large
following in Britain."

It is submitted, however, that this showed no more than that capital punishment was an issue on which people, when asked, were readily able to give an opinion. That is, their opinions were based almost purely on emotion or bias, not reason. It does not prove, however, that, had their opinions not been sought, they would have spontaneously voiced them anyway. Given that the issue, in the absence of a particularly heinous murder, does not really arouse a person's self-interest, it may well be the case that, if it is left out of the controversy by the major protagonists, abolition will not produce a large public following. Sir Ernest Gowers lends indirect support to this proposition when he says:

"Before serving on the Royal Commission I, like most other people, had given no great thought to (abolition). If I had been asked for my opinion, I should probably have said that I was in favour of the death penalty." 2

Is it possible then to avoid having the public asked its opinion? If the retentionists are alert and if the mass media become aware of the possibility of capital

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2. Gowers, \textit{op. cit.}, p. 8. (Underlining added by the present writer.)
punishment becoming a political issue (as is extremely probable in a modern democratic society) the answer is probably "No". In Queensland, however, it was possible to allow only a very limited public involvement in the issue, much to the benefit of the abolitionists. At any rate this should, in general, be the aim of abolitionist groups. They will probably have higher hopes for success in this too if their main level of approach is made to the Government or a political party, rather than the more public level of the legislature. As previously indicated, there would seem to be other reasons also for recommending this line of approach to "attitudes" groups seeking such single-purpose aims as the abolition of capital punishment.
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a. Convicted in 1861. Of the two convicted in 1862, one was
pardoned and the other shot while trying to escape.
b. One accessory before the fact to murder.
c. One armed robbery with wounding.
d. Rape and unlawful carnal knowledge of girls under ten
Convictions and acquittals were combined in the same
statistic.
e. One armed robbery with wounding.
f. The two "Hopeful Prisoners".
g. One fasted to death while under sentence of death and
the other's sentence was commuted by the Governor
contrary to the Government's wish.
h. Rape no longer a capital punishment. Executions for
Murder and total executions are identical henceforth.
i. Labor Government in Power.
j. First Bill to abolish capital punishment introduced,
rejected by Council.
k. Bill to abolish capital punishment passed by Parliament.
<table>
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<td>Murder</td>
<td>Victoria</td>
<td>Presbyterian</td>
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### Executions

- Murder (and accessory to) = 65
- Rape = 14
- Robbery-under-arms with wounding = 2

**Total** = 81
REligion of Those Executed

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<td>C. of E.</td>
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<td>Rape</td>
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<td>Armed robbery with wounding</td>
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Age of Those Executed

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Race or Nationality of Those Executed

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a. Excluding the Irish
b. Including the Queensland born Eurasian Silva.

Executions for Rape:

Convictions for Rape:

Mid-points of Five Year Periods.
## APPENDIX 2.

**Public Activists in Various Movements for Commutation.**

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<th>YEAR</th>
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<td>T.S. Warry</td>
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<td>Fiele J.</td>
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</tr>
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<tr>
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<tr>
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<td>M.L.A.</td>
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<tr>
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<td>Ex- and later M.L.A., Late M.L.C.</td>
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</tr>
<tr>
<td></td>
<td>Coote</td>
<td>Journalist, Historian, later concerned in Northern Separation Movements</td>
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<tr>
<td></td>
<td>Chubb F.</td>
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</tr>
<tr>
<td></td>
<td>Fitzgerald</td>
<td>Ex - M.L.A.</td>
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<tr>
<td></td>
<td>Fitzgibbons</td>
<td>? Not a professional man</td>
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<tr>
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<td>Garrick</td>
<td>M.L.A., and Barrister later Agent-General</td>
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<tr>
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<td>Journalist, a former editor of the Ipswich Observer</td>
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<td></td>
<td>Miller</td>
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<td>Murray</td>
<td>? Not a professional man</td>
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<td>Murray-Prior</td>
<td>Later M.L.C.</td>
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<tr>
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<td>M.L.C., F.R.C.S., Ex-M.L.A.</td>
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<td></td>
<td>Oliphant</td>
<td>?</td>
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<tr>
<td>YEAR</td>
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<td></td>
<td>Rutledge</td>
<td>M.L.A. (later Attorney-General and Barrister)</td>
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<td>Barrister</td>
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<td>M.L.A., Barrister (till 1883) ex-School Teacher, later a J.P.</td>
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<tr>
<td></td>
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<tr>
<td></td>
<td>Wade</td>
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<tr>
<td></td>
<td>*Groom</td>
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<tr>
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<td>Buchanan</td>
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</tr>
<tr>
<td></td>
<td>Coe</td>
<td>?</td>
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<td></td>
<td>Chubb F.</td>
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<tr>
<td></td>
<td>Dunlop</td>
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<td></td>
<td>Gignon</td>
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<td>M.L.A., ex-Wesleyan preacher</td>
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<td>*Russell</td>
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<td>*Stewart</td>
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<td></td>
<td>*Walters</td>
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<td>*Widdop</td>
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<td></td>
<td>*Russell</td>
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<td>*Sutton</td>
<td>M.D., and President of Masonic Lodge</td>
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<td>Hotel Owner, soft drink manufacturer and President of School of Arts</td>
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<td>*Lesina</td>
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<tr>
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<td>*Lloyd</td>
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<tr>
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<td>STATUS OR OCCUPATION</td>
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<td></td>
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<tr>
<td></td>
<td>Seymour</td>
<td>(later editor of the <em>Worker</em>)</td>
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<tr>
<td>YEAR</td>
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<td>STATUS OR OCCUPATION</td>
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<td>Sumner</td>
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<tr>
<td>*</td>
<td>Williams</td>
<td>President C.T.U. (Christian Temperance Union).</td>
</tr>
<tr>
<td></td>
<td>Wilson</td>
<td>Mayor of Brisbane</td>
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* = Most Prominent Participants or Key Figures, based chiefly on newspaper reports of the various incidents.
Parliamentarians who signed the 1884 Petition

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</tr>
<tr>
<td>Murray-Prior</td>
<td>Foxton</td>
</tr>
<tr>
<td>O'Doherty</td>
<td>Fraser</td>
</tr>
<tr>
<td>Raff</td>
<td>Groom</td>
</tr>
<tr>
<td>Roberts</td>
<td>Higson</td>
</tr>
<tr>
<td>Smyth</td>
<td>Howitz</td>
</tr>
<tr>
<td>Taylor</td>
<td>Isambert</td>
</tr>
<tr>
<td>Thynne</td>
<td>Jessop</td>
</tr>
<tr>
<td>Walsh</td>
<td></td>
</tr>
<tr>
<td>Wilson</td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL = 21**

**TOTAL = 38**
### Public Opponents of Capital Punishment to 1900

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NAME</th>
<th>REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1860</td>
<td>Jordan</td>
<td>M.L.A. - Brisbane, East Moreton and Brisbane South in the 1st, 4th, 5th, 9th, 10th parliaments. i.e. 1860-71; 1883-93. Secretary for Public Lands 30/8/87-13/6/88. Later Agent-General.</td>
</tr>
<tr>
<td>1862,3</td>
<td>Pugh (as Editor of Courier. Government Printer, Journalist, M.L.A. - Brisbane in the 2nd, 3rd and 4th parliaments 1863-1970</td>
<td></td>
</tr>
<tr>
<td>1879</td>
<td>W. Bailey</td>
<td>M.L.A. - Wide Bay, 7th, 8th and 9th parliaments. i.e. 1874-88</td>
</tr>
<tr>
<td></td>
<td>J. MacFarlane</td>
<td>M.L.A. - Ipswich, 7th-11th parliaments i.e. 1878-1896</td>
</tr>
<tr>
<td></td>
<td>P. O'Sullivan</td>
<td>M.L.A. - Ipswich, West Moreton, Burp &amp; Stanley 1st, 3rd, 7th, 9th and 10th parliaments. i.e. 1860-3; 1867-8; 1874-33; 1838-93</td>
</tr>
<tr>
<td>1885</td>
<td>A. Midgley</td>
<td>M.L.A. - Fassifern, 9th parliament i.e. 1883-8. Ex-Wesleyan Minister</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Copeland Spode Juror in McNeill's case</td>
</tr>
<tr>
<td>1892</td>
<td>Mrs. A. McLean</td>
<td>Major Robinson Salvation Army</td>
</tr>
<tr>
<td>1896</td>
<td>J.K. Coates</td>
<td>Juror who told Griffith J.C. that he could under no circumstances bring in a verdict leading to the death sentence being passed in R. v Longlands</td>
</tr>
<tr>
<td>1899</td>
<td>Lesina</td>
<td>M.L.A. - Clermont, 13th-18th parliaments, i.e. 1899-1912.</td>
</tr>
</tbody>
</table>
### APPENDIX 3.

**Labor M.L.A.'s as of September, 1899**

<table>
<thead>
<tr>
<th>Name</th>
<th>Electorate</th>
</tr>
</thead>
<tbody>
<tr>
<td>D. Bowman</td>
<td>Warrego</td>
</tr>
<tr>
<td>W.H. Browne</td>
<td>Croydon</td>
</tr>
<tr>
<td>A. Dawson</td>
<td>Charters Towers</td>
</tr>
<tr>
<td>T. Dibley</td>
<td>Woolloongabba</td>
</tr>
<tr>
<td>J.H. Dunsford</td>
<td>Charters Towers</td>
</tr>
<tr>
<td>A. Fisher</td>
<td>Gympie</td>
</tr>
<tr>
<td>C.B. Fitzgerald</td>
<td>Mitchell</td>
</tr>
<tr>
<td>T. Glassey</td>
<td>Bundaberg</td>
</tr>
<tr>
<td>T. Givens</td>
<td>Cairns</td>
</tr>
<tr>
<td>W. Hamilton</td>
<td>Gregory</td>
</tr>
<tr>
<td>W.F. Hardacre</td>
<td>Leichhardt</td>
</tr>
<tr>
<td>W.G. Higgs</td>
<td>Fortitude Valley</td>
</tr>
<tr>
<td>G. Jackson</td>
<td>Kennedy</td>
</tr>
<tr>
<td>G. Kerr</td>
<td>Baroo</td>
</tr>
<tr>
<td>W. Kidston</td>
<td>Rockhampton</td>
</tr>
<tr>
<td>V.B.J. Lesina</td>
<td>Clermont</td>
</tr>
<tr>
<td>W. Maxwell</td>
<td>Burke</td>
</tr>
<tr>
<td>C. McDonald</td>
<td>Flinders</td>
</tr>
<tr>
<td>F. McDonnell</td>
<td>Fortitude Valley</td>
</tr>
<tr>
<td>M. Reid</td>
<td>Enoggera</td>
</tr>
<tr>
<td>G. Rylands</td>
<td>Gympie</td>
</tr>
<tr>
<td>J.C. Stewart</td>
<td>Rockhampton North</td>
</tr>
<tr>
<td>H. Turley</td>
<td>Brisbane South</td>
</tr>
</tbody>
</table>

**Total:** 23

D.T. Keogh (Rosewood) had left the party prior to the second reading of the Criminal Code Bill in 1899 and has not been
counted.

+ Members of the first Labor Government, 1899
  Maxwell seconded Lesina's amendment, but did not speak to it.

Labor held seats broken down geographically

<table>
<thead>
<tr>
<th></th>
<th>...</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Metropolitan</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Provincial Town</td>
<td></td>
<td>8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(including the two members for Charters Towers).</td>
</tr>
<tr>
<td>Country</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(12 if Charters Towers is included)</td>
</tr>
</tbody>
</table>

The only ones to indicate any support for Lesina's abolition amendment were Dunsford, Fitzgerald, Glassey, Hardacre, Maxwell, and Rylands, although none seem to have favoured complete abolition (i.e. not for wilful murder).

None of the Brisbane Members (not even Reid) gave any visible support.
APPENDIX 4.

J. S. Collinga, as the following shows, held many important positions in the Labor Movement in Queensland and this no doubt greatly assisted the cause of abolition of capital punishment within the party.

By profession, he was a boot and shoe manufacturer whose business suffered greatly "because of the uncompromising stand which (he took) on behalf of the Industrial Unionism during the 1912 Strike (and which led to his being viciously victimized by certain sections of the Commercial community" (Worker - 16/3/1912). His company was taken over in 1912 by the Wattle Co-operative Boot Co., whose Board of Directors comprised leading Union officials, Dave Bowman and Colling himself.

Brief Political Chronology:

1903 A trustee of the Brisbane Political Labor Council.
1904 Secretary and Treasurer of the P.L.C. Member of the Toombul W.P.O.
1905 Elected at the Convention as a member of the C.P.E.
1906 President of the Social Democratic Vanguard
1908 Unsuccessful candidate for Bulimba
1909 Unsuccessful candidate for Bulimba Representative of the Bulimba W.P.O. at Prime Minister Fisher's Conference in Gympie
1913 Vice-President of the Labor-in-Politics Convention Elected to C.P.E.
1915 Unsuccessful candidate for Murilla
1918 Elected at Convention to the C.P.E.
1918-31 State Organizer of Labor Party in Queensland
1920-21  Labor nominee in the Legislative Council

1931  Elected as Senator for Queensland

He was also a J.P. until 1912 when he was removed from the list because of "conduct unbecoming" a J.P.
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A. NEWSPAPERS

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   The Moreton Bay Courier, The Brisbane Courier and the Courier Mail - 1860 to 1922, inter alia.
2. The Daily Standard - 1912 (Dec.) to 1916 and 1922 in particular.
3. The Queenslander - 1879, 1880 (Feb. - April) 1884 (Dec.) in particular.
4. The Telegraph - 1880 (Feb. - April), 1884 (Nov. - Dec.), in particular.
5. The Worker - 1901 to 1922.

B. Parliamentary Journals and Reports

2. Q.P.D. - Queensland Parliamentary Debates - 1863 to 1922, and 1929 to 1932.

C. Theses

1. M.A. Theses submitted to the University of Queensland
   2. S.A. Rayner, "The Evolution of the Queensland Labor Party to 1907", 1947
II. B.A. Theses submitted to the University of Queensland

1. M. Birrell, "T.J. Ryan and the Queensland Labor Party, 1901-1919"; 1951


III. B.A. Penultimate Year (in History Honours) Thesis, submitted to the University of Queensland


2. P.D. Crook, "Queensland Politics from 1900 to 1915", 1957.


All these are available from the History Department of the University of Queensland, while some may also be found in the University Library.
D. Labor Party Reports and Records

1. C.P.E. (later Q.C.E.) Minute Books, 1901-1922

2. Official Records of:
   
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   The Third Labor-in-Politics Convention, 1902
   The Fourth Labor-in-Politics Convention, 1905
   The Fifth Labor-in-Politics Convention, 1907
   The Sixth Labor-in-Politics Convention, 1910
   The Seventh Labor-in-Politics Convention, 1913
   The Eighth Labor-in-Politics Convention, 1916
   The Ninth Labor-in-Politics Convention, 1918
   The Tenth Labor-in-Politics Convention, 1920
   The Eleventh Labor-in-Politics Convention, 1923

All kindly made available by Mr. T. Burns, Secretary Queensland Branch of the A.L.P.

E. Law Books, Journals and Reports

I. Books


II. Journals


III. Reports


F. Other Published Works


G. Other Unpublished Works


2. R.N. Barber, "The Issue of Six O'clock Closing in Queensland during the Great War", May, 1967, (Dept. of Government, University of Queensland)


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6. A. Morrison, "A Lecture on the Life of William Cootes" (held in the Oxley Library, Brisbane).

7. T. O'Sullivan, "Reminiscences of the Queensland Parliament, 1903–1915" (held in Oxley Library)
G. Other Unpublished Works (contd.)

8. T. O'Sullivan, "Sketch of the Career of the Hon. Patrick Real" (held in the Oxley Library and the Freyer Memorial Library at the University of Queensland)