



No. 3

Capital punishment

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This report is the third in the series on Trends and Issues in Crime and Criminal Justice produced by the research division of the Australian Institute of Criminology. This Institute is often questioned - by the media, politicians and the public - upon the pros and cons of capital punishment; clearly, public interest in this issue has not abated despite its abolition. This continuing public discussion on capital punishment should occur in the context of the facts concerning the use of the death penalty in Australia and in overseas countries. To this end, the Institute presents material which we believe will encourage informed debate on an issue which has too often been discussed in a highly emotive manner.

Richard Harding
Director

The term 'capital punishment' is derived from the Latin *caput*, meaning 'head'. It originally referred to death by decapitation, but now applies generally to state sanctioned executions. Some Middle East countries still practise decapitation for certain offences, but more common forms of the death penalty include electrocution, gas, firing squad, lethal injection and hanging.¹

The History of Capital Punishment in Australia

In Australia in the nineteenth century as many as 80 persons were hanged per year for crimes such as burglary, sheep stealing, forgery, sexual assaults and even, in one case, 'being illegally at large', as well as for murder and manslaughter. This was at a time when the population was counted in the hundreds of thousands rather than millions. Since Federation (1901), only 114 persons have been legally executed in Australia. Incidentally this figure of 114 happens to coincide with the total number of persons said to have been executed in South Africa in 1984.³

Australia, in common with most Western countries (see Tables 1 and 2), has abolished capital punishment. Yet debate on this topic has not abated. Table 1 illustrates the diminishing use of the death penalty and dates of abolition in each jurisdiction since 1820. The last person to be executed in Australia was Ronald Ryan. Ryan was 'hanged by the neck until he was dead' at Pentridge Prison, Victoria in 1967. Now the sentence of life imprisonment (in some states 'penal servitude for life', 'strict security life imprisonment', or 'for the term of his natural life') has become the most severe sanction authorised by Australian law.

While Table 1 gives the date of abolition of capital punishment in the State of New South Wales as 1955 and Western Australia is generally regarded as the last State to abolish capital

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Table 1 Number of executions carried out in Australian jurisdictions since 1820²

Year	1820-							1900-							Last execution			
	29	30-39	40-59	50-59	60-69	70-79	80-89	90-99	09	10-19	20-29	30-39	40-49	50-59		60-69	70-79	80-89
NSW	170	288	99	36	51	23	26	67	12	5	2	4	1	(abol 1955)	-	-	-	1940
VIC	-	-	-	56	39	23	14	19	5	5	2	5	1	3	1	(abol 1975)	-	1967
QLD	-	-	-	-	7	18	19	12	16	3	(abol 1922)	-	-	-	-	-	-	1913
WA	-	-	-	-	-	-	4	9	18	7	5	2	-	2	4	-	(abol 1984)	1964
SA	-	3	9	7	12	7	2	4	4	4	4	-	2	3	1	(abol 1976)	-	1964
TAS	190	99	90	89	19	3	5	1	-	2	1	1	1	-	(abol 1968)	-	-	1946
NT	-	-	-	-	-	-	-	-	-	-	-	-	-	2	-	(abol 1973)	-	1952
ACT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(abol 1973)	-	-
Total	360	390	198	188	128	74	70	112	55	26	14	12	5	10	6	-	-	

Source: Mukherjee *et al.*, 1985.

punishment in Australia (in 1984), New South Wales did in fact retain some residual offences relating to piracy and treason, which continued to carry the death penalty. However these anomalies were swept away with the passing of the *Crimes (Death Penalty Abolition) Amendment Act*, 1985. Under Commonwealth law, the death penalty was abolished in 1973 by s.4 of the *Death Penalty Abolition Act*, 1973.

The United States of America stands in stark contrast to the abolitionist jurisdictions. For almost a decade from the mid-60s the death

penalty was declared to be 'a cruel and unusual punishment', because it had been administered in arbitrary manner.⁵ Since then, constitutional objection to the imposition of capital punishment has been overcome and 37 jurisdictions of the United States may now impose the death penalty. Between 1976 and the end of 1984, 32 persons were executed. By March 1986 the figure had risen to 51 and a further 1600 prisoners are on death row, awaiting appeals to higher courts, commutation of sentence or execution.

These figures raise the issue as to

whether the death penalty is, or indeed can ever be, applied in other than a capricious or discriminatory manner.⁶ The criminal justice system is not noted for its infallibility and the modern history of the death penalty is replete with examples where sentences of death have been commuted to less severe forms of punishment, indicating a reluctance to impose the ultimate sanction even when available.

Public Opinion Polls

Although Australia has abandoned capital punishment, it does not follow that it could never be reintroduced. Nor does it mean that it cannot be imposed on Australians travelling overseas, as illustrated by the double execution of Barlow and Chambers who were hanged in Malaysia on 7 July 1986 for drug trafficking. Whenever a particularly vicious crime is committed, members of the public, police, politicians and the press 're-open' the debate on the death penalty. For example, as recently as October (1986) the 30 member council of the Police Federation of Australia voted unanimously to press State and Federal Governments to hold a referendum upon the reintroduction of capital punishment. The issue of capital punishment is most often raised in respect of sex-murder cases, acts of wanton terrorism, or the killing of police or prison officers.

Over recent years, a number of opinion polls have been carried out to

Table 2 List of abolitionist countries⁴

All offences	Ordinary offences*	Abolition since 1975
Australia	Argentina	1975 Mexico
Austria	Brazil	1976 Canada
Bolivia	Canada	1977 Portugal
Cape Verde	Cyprus	1978 Spain
Colombia	El Salvador	1979 Luxembourg
Costa Rica	Fiji	Nicaragua
Denmark	Israel	Norway
Dominican Republic	Italy	Brazil, Fiji
Ecuador	Malta	1980 Peru
Finland	Mexico	1981 France
Federal Republic of Germany	Monaco	1982 Netherlands
France	New Zealand	1983 Cyprus
Holy See	Papua New Guinea	El Salvador
Honduras	Peru	1984 Argentina
Iceland	San Marino	1985 Australia
Kiribati	Spain	
Luxembourg	Switzerland	
Netherlands	United Kingdom	
Nicaragua		
Norway		
Panama		
Portugal		
Solomon Islands		
Sweden		
Tuvalu		
Uruguay		
Vanuatu		
Venezuela		

* Abolished for all crimes except certain military and political offences.

Source: Amnesty International, 1986.

determine the public's attitude to capital punishment. Results vary because of differences in the wording of the questions, and in the type and timing of the surveys. A phone-in poll conducted in January 1986 by a Sydney TV station shortly after a particularly gruesome sex-murder received over 48 000 calls. On this occasion 95 per cent of the respondents were in favour of the reintroduction of capital punishment.

More reliable surveys, such as those run by Australian Public Opinion Polls or Morgan Gallup Polls, have elicited pro-capital punishment results ranging from 70 per cent (in response to a question which specifically related to crimes such as child murder, rape-murder or gang war murder)⁷ to only 43 per cent (where an almost equal percentage voted for life imprisonment when asked to decide the appropriate penalty for murder. See Table 3).⁸

A national survey was commissioned in May, 1986 by the Australian Institute of Criminology and involved 2551 respondents over the age of 14 years. It revealed that only 26 per cent of respondents felt that the death penalty was appropriate for a person who had stabbed a victim to death, and only 17 per cent favoured capital punishment in respect of a person convicted of serious drug trafficking.

Effects of Capital Punishment: Crime Rates

Although media reports may suggest homicide rates are forever increasing, statistics show that on a per capita basis the incidence of these crimes is relatively constant. Trends in Australia over the last 20 years demonstrate an increasing number of homicide cases (excluding driving causing death) being reported to the police, but since the figures are rising more slowly than the population, *the homicide rate has actually fallen over this period*, from nearly six per hundred thousand to less than 4.4. The

Table 3 Death penalty or jail for murder

	1980 %	1986 %	Federal voting intention		
			ALP %	Dem %	L-NP %
Death Penalty	43	43	42	40	45
Imprisonment	40	41	42	42	40
Undecided	17	16	16	18	15
	100	100	100	100	100

Source: Morgan Gallup Poll, File No. 1409, *Bulletin*, 11 March 1986.

relevant data, incorporating murder statistics between 1973 and 1984 are set out in figures 1 and 2.⁹

The argument for capital punishment usually hinges on the fear of increasing murder rates. Yet in Queensland, for example, in the decade prior to the abolition of capital punishment (1912-21), there were 131 murders, whereas in the decade following abolition (1923-32) there were 129 murders. These data are not conclusive but suggest that abolition does not lead to an increase in the incidence of this offence.¹⁰

Table 4 shows that of the major Australian states, only South Australia experienced any sudden increase in murder or manslaughter convictions in the five years after abolition compared to the five years before, yet a detailed report on homicide published in 1981 by the South Australian Office of Crime Statistics showed that abolition of the death penalty had no effect on homicide trends in that state.¹¹

Experience overseas supports this

Australian evidence. For example, when statistical material from various countries is considered, the presence or absence of the death penalty does not appear to indicate any significant influence upon the rates of murder and homicide¹² and *the preponderance of evidence suggests that the abolition of capital punishment has not resulted in any significant increase in the murder rates.*¹³

Effects of Capital Punishment: Sentencing Differences

The 'before' and 'after' data in Table 4 on the percentages of manslaughter verdicts tend to support, albeit weakly, the theory that *juries are reluctant to convict for capital offences*, and will either acquit or convict on a manslaughter charge, which does not carry the death penalty. In Victoria and Queensland the proportion of manslaughter

Figure 1 Reported homicide and murder cases—Australia 1965–84

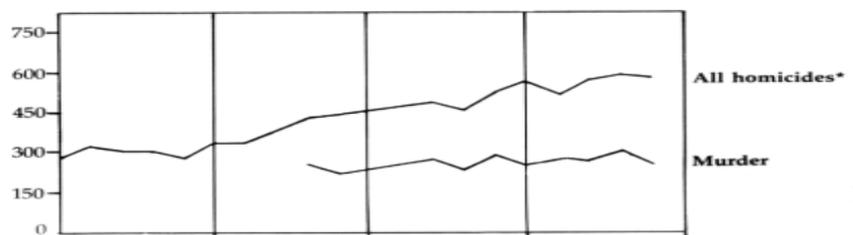
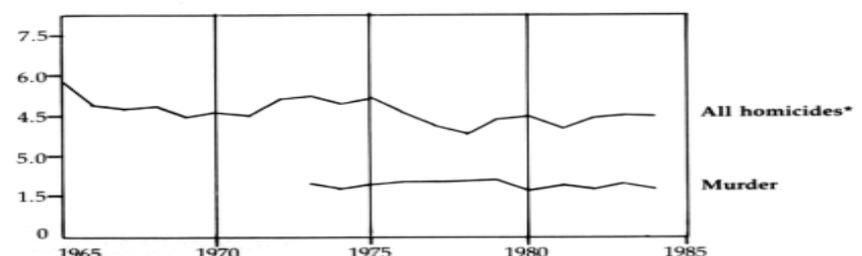


Figure 2 Reported homicide and murder rates per 100 000 persons aged 10 and over—Australia 1965–84



*Includes murder, attempted murder, manslaughter but excludes manslaughter by driving.
Source: Mukherjee et al., forthcoming.

convictions was higher when capital punishment was available than after abolition. In New South Wales, although the percentage of manslaughter verdicts rose after abolition, the proportion of murder/manslaughter cases which resulted in acquittals fell dramatically from 26 per cent to 17 per cent over the same period (Mukherjee, *et al.*, 1981). Unfortunately, data are not available in sufficient detail to show if similar trends occurred in other states. An earlier study (Johnston, 1962), however, found quite convincing evidence which indicated that convictions for murder were less likely in jurisdictions where there was a possibility that the offenders would be hanged. As the author explained, 'Juries, not always ready to trust the government, commit a pious perjury, and bring in fewer verdicts of the capital crime, murder, under a conservative government than under a Labour government'.¹⁵

The availability of capital punishment also appears to attract a significantly higher incidence of insanity verdicts. The effect of such a verdict is that it results in a direction that the prisoner be detained 'at the Governor's Pleasure', an indeterminate form of disposition and again this avoids the death penalty.

Victorian data for the five years prior to abolition show that there were 30 convicted murderers and 24 persons acquitted on account of insanity (total 54) whereas in the five years after abolition there were 43 convicted murderers but only 13 persons acquitted on account of insanity (total 56).¹⁶

Capital Punishment: the Debate

Nature of capital offences

A substantial portion of all homicides in Australia are the results of domestic disputes. Research from New South Wales has shown that four out of five homicide victims knew their attacker, and often their relationship was an intimate one.¹⁷ Often they involve murder-suicides resulting from family breakdowns, or the tragic response of one family member to years of ill-treatment from another. The courts sometimes categorise homicides arising out of matrimonial discord as manslaughter, and take mitigating circumstances into account at the sentencing stage. Very short prison sentences, or even non-custodial sanctions, are occasionally handed down in such cases. With the exclusion of deaths by driving, the balance of homicides in Australia are typically connected to criminal underworld in fighting, or associated with other offences such as rape and robbery, terrorist attacks, or hijackings. In such cases the offender is more clearly deserving of severe punishment - particularly, as in the latter cases, where the victim is often an innocent bystander.

Unfortunately, with the exception of one New South Wales study, there is a paucity of official statistics or studies showing the relative percentages in these categories.¹⁸ Statistics from the United States of America suggest that almost 20 per cent of all murders in the country are committed in association with offences such as robberies, drug

offences, rapes or arson.¹⁹ Around 40 per cent arise out of arguments many of which are domestic, *and such events are seldom considered to be affected by the existence or otherwise of capital punishment.*

Deterrence

Where offences are committed in the heat of passion, with no premeditated *intention* to kill, the offender often makes little attempt to avoid detection. In these circumstances it is clear that the deterrent effect is minimal. On the other hand where homicides are premeditated, the threat of capital punishment may be less of a deterrent than the risk of being caught. Further than this, *the death penalty may create a brutalising effect, actually inspiring acts of violence, and thereby diminish rather than increase the deterrent effect of capital punishment.*²⁰ Certainly the evidence to date has failed to establish that the death penalty is any more effective than imprisonment in deterring crime.²¹

Incapacitation and recidivism

There is grave public concern of convicted persons re-offending on release. There is no question that the death penalty provides the ultimate incapacitate. It removes the risk that the offender may escape or be released on licence or parole and kill again. It also removes the risk that the prisoner may kill a prison officer or another inmate while serving his or her sentence

Yet the rate of recidivism for murder is amongst the lowest of all offences. Thus, acting on information received from nearly all Commonwealth countries, including Australia, the British Royal Commission on Capital Punishment reported that the majority of released murderers behaved well after leaving prison and were not regarded as a type of prisoner that were particularly liable to misbehaviour upon release. If this is so, *life imprisonment would appear to be a sufficient incapacitate for murderers.*²²

Table 4 Effects of abolition on conviction rates for murder and manslaughter¹⁴

Jurisdiction	Av. no. of convictions for murder and manslaughter in 5 years prior to abolition	Percentage of manslaughter verdicts	Year of abolition	Av. no. of convictions for murder and manslaughter in 5 years after abolition
New South Wales	31	46	1955	29
Victoria	28	57	1975	29
Queensland	8	31	1922	11
South Australia	10	35	1976	16

Source: Mukherjee *et al.*, 1981.

Retribution.

The concept of an 'eye for an eye, a tooth for a tooth' is said to be applicable to capital punishment. Under this theory, sometimes referred to as 'just deserts', it is not necessary to argue that the death penalty is instrumental in achieving some other purpose such as community protection or deterrence, *the person who murders*, it is said, *should be executed for the sake of justice alone*.

Against this moral argument is one which holds that the community itself has the power to determine what is just and fair punishment. After all there is no law of the nature indicating that the ultimate sanction should or should not be death. Some people may believe that the taking of a life, even if sanctioned by law, is a barbaric enterprise that serves only to brutalise the community. Furthermore it is possible to argue that *there is something illogical in the State employing execution to demonstrate its high regard for the sanctity of human life*.

Rehabilitation

By definition capital punishment does not rehabilitate offenders. In the case of serious crime rehabilitation assumes a secondary consideration to social defence and retributive notions of punishment. Nevertheless it is well recognised that the people change over time and many murderers, sometimes through the ageing process itself, can and do change their attitudes towards crime. *This enables the majority of life sentenced prisoners to be released back into the community without significant risk to that community after they have served a significant term of imprisonment*.

When justice errs

It is too late to reverse the decision or compensate the prisoner for a miscarriage of justice after the death sentence has been carried out. No case better illustrates this point than that of Timothy Evans. Evans was hanged in 1950 in the United Kingdom for

murders subsequently found to have been committed by the notorious John Christie and was pardoned posthumously in 1966. In Australia there have been cases where those wrongly convicted of murder have eventually been released and pardoned. The case of Edward Splatt is but one recent example. *In view of the severity and irreversibility of the death penalty there would need to be very compelling arguments to justify the reintroduction of capital punishment*.

Conclusion

While public opinion polls generally indicate that a majority of the community are in favour of capital punishment for certain offences, many people would currently argue that it has little real deterrent value over and above that of imprisonment. Those who argue for the death penalty on the grounds that at least the killer is removed permanently from society, have also to keep in mind the fact that in practice the death penalty is often administered capriciously and that there is always a possibility that an innocent person may be executed.

Notes

1. At the time of writing in the United States lethal injections are the preferred method of execution (16 states) then electric chairs (14 states) followed by gas chambers (7 states), hangings (4 states) and firing squads (2 states). History records many other methods of putting persons to death, including flaying and impaling, boiling in oil, crucifixion, stoning, pulling asunder, breaking on the wheel, burying alive, sawing in half, pressing to death, drowning, drawing and quartering, and burning at the stake. See Bedau, Hugo Adam (ed). (1982), *The Death Penalty in America*, 3rd edition, Oxford University Press, New York, 14.
2. Mukherjee, S. K., Walker, J. R., and Jacobsen, E. N. (1985), *Crime and Punishment in the Colonies, A Statistical Profile*, Historical Statistics Monograph No. 6, University of New South Wales, Sydney. In the early part of the nineteenth century the jurisdiction of NSW included what is now Victoria and Queensland. Similarly, Northern Territory was incorporated in South Australia. Note also that NSW did not completely do away with capital punishment in 1955. Certain offences

- relating to treason, piracy and arson of naval dockyards continued to carry the death penalty on the statute books until removed in 1985.
3. Of those executed in South Africa, 2 were white, 87 black, 24 coloured and 1 Indian. South Africa is the only Western Country which executes people regularly for a wide range of offences, including murder, rape and robbery—*Sydney Morning Herald*, 1 March, 1985.
 4. The data presented in Table 2 were compiled on the basis of information available to Amnesty International as of February 1986. Some countries, namely Mexico, Canada, Spain, Brazil, Fiji, Peru, Cyprus, El Salvador and Argentina continue to provide for the death penalty for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime. At the time of writing the United States of America, which does not appear in the table, is the only country with divided jurisdictions in which the law provides for the death penalty in some states but not in others.
 5. *Furman v. Georgia*, 408 US 238 (1972).
 6. See for example, Harris, Carmel (1982) 'The "Terror of the Law" As Applied to Black Rapists in Colonial Queensland', *Hecate*, 8, 2, 22-48.
 7. Australian Public Opinion Polls, January 1985.
 8. Morgan Gallup Polls, 1980 and 1986.
 9. Source of basis data: Mukherjee, S. K., Jacobsen, E. N., and Walker, J. R. (1981), *Source Book of Australian Criminal and Social Statistics 1900-1980*, Australian Institute of Criminology, Canberra
 10. Barber, R. N and Wilson, P. R (1968), 'Deterrent Aspects of Capital Punishment and its Effect on Conviction Rates: The Queensland Experience', 1 *ANZJ Crim*, 100.
 11. Grabosky, P. N., Koshnitsky, N. S., Bajcarz, H. D. and Joyce, B. W. (1981), *Homicide and Serious Assault in South Australia*. Attorney-Generals Department, Office of Crime Statistics, Series II, No. 9, November.
 12. Beyleveld, Deryck, Bottoms, A. E. and Wiles, Paul (1979), 'Is there any evidence that hanging deters killers?', *New Society*, 759. See also Forst, B. E. (1971), 'The Deterrent Effect of the Death Penalty: A Cross-State Analysis of the 60s', 61 *Minnesota Law Review*, 764; Zeisel, Hans (1976), 'The Deterrent Effect of Capital Punishment: Facts vs. Faith', *Supreme Court Review*, 317-43.
 13. Rehav, Giroa (1983), 'Homicide and Death Penalty: A Cross-sectional Time Series Analysis', *International Journal of Comparative and Applied Criminal Justice*, Spring, 7,1, 61-71.
 14. Source of basic data: Mukherjee, S. K., Jacobsen E. N., and Walker, J. R. (1981), *Source Book of Australian Criminal and Social Statistics 1900-1980*, Australian Institute of Criminology, Canberra. Comparable 'before and after' figures are

not yet available for other jurisdictions. Tasmania conviction data are not available in detailed form, and in any event small numbers of cases result in meaningless trends. Northern Territory data are effected by the major population upheavals associated with Cyclone Tracy.

15. Johnstone, Stanley, W. (1962); 'Criminal Homicide Rates in Australia', Howard League for Penal Reform, Victoria.

16. Corrected Data from Potas, I. (1982) *Just Deserts for the Mad*, Australian Institute of Criminology, Canberra, 65.

17. Wallace, Alison (1986), *Homicide: The Social Reality*, New South Wales Bureau of Crime Statistics and Research, Sydney, 93

18. Ibid.

19. 'Crime in the United States' (1984), Federal Bureau of Investigation, Government Printing Office, Washington DC.

20. Bowers, W, Pierce, G., and McDevitt, J. (1984), *Legal Homicide: Death as Punishment in America, 1964-1982*, 333. At *ibid*, the authors are highly critical of the claim by Ehrlich, Isaac, in 'The Deterrent Effect of Capital Punishment: A Question of Life and Death', *American Economic Review*, 397 (1975), that the death penalty deters potential murderers. There is vast literature on the subject, see for example, Barnett, A., 'The Deterrent Effect of Capital Punishment: A Test of Some Recent Studies', *29 Operations Research* 346 (1981); Brier, S. S. and Fienberg, S. E., 'Recent Econometric Modelling of Crime and Punishment: Support for the Deterrence Hypothesis?' (1980) *Indicators of Crime and Criminal Justice: Quantitative Studies*, NCJ-62349, Washington DC, Dept of Justice, Government Printing Office; Van den Haag, Ernest and Conrad, John P. (1983), *The Death Penalty: A Debate*, Plenum Press New York.

21. Panel on Research on Deterrent and Incapacitate Effects (1978), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (ed. Blumstein *et al*) National Academy of Science, Washington DC, see also 'Hugo Adam Bedau' in Mackey Phillip English (ed.) (1976) *Voices Against Death*, Burt Franklin and Co., New York, 303

22. *Royal Commission on Capital Punishment 1949-53* (1953), HMSO, London. See also Burgoyne, Peter H., (1979) *Homicide and Recidivism*, Report to the Criminology Research Council and Victorian Department of Community Welfare Services.



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