

## RESEARCH REPORT 34:

### EVIDENCE-BASED POLICYMAKING AND THE ABOLITION OF CAPITAL PUNISHMENT

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The question whether the death penalty is to be dropped, retained or instituted is not dependent on the evidence as to its utilitarian effects, but on the strength of popular beliefs and sentiments not easily influenced by such evidence. ...

When a people no longer likes the death penalty for murderers it will be removed, no matter what may happen to the homicide rates.<sup>2</sup>

Capital punishment dominated the news in Australia in April 2015, when convicted drug traffickers, Australians Andrew Chan and Myuran Sukumaran, were executed by firing squad in Indonesia, after serving ten years on death row.

This had repercussions in Papua New Guinea. On 11 May PNG's prime minister, Peter O'Neill, said that the death penalty was now 'under review' after recent global outcry over the Indonesian executions. PNG had revived capital punishment in 2013 in order to reduce rampant crime (prompted in part by the burning alive of a 20-year-old woman for sorcery), and had approved three modes of execution: hanging, lethal injection and firing squad. However, none of the 12 convicts on death row have been killed, due to a lack of 'infrastructure'.<sup>3</sup>

When the British Parliament finally abolished capital punishment in 1965, it drew on evidence provided by the Royal Commission on Capital Punishment (1949-1953). The Royal Commission, in turn, had drawn on international statistics, including those from

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<sup>2</sup> Professor Thorsten Sellin, cited in *A Life for a Life*, p.138. Sellin (1896-1994), an American sociologist at the University of Pennsylvania, a penologist and one of the pioneers of scientific criminology, was outspoken in his opposition to the death penalty. He contended that comparisons of statistical data from jurisdictions with and without the death penalty showed that it was no deterrent to crime. He carried out research on the death penalty at the request of official commissions in Canada and Britain as well as various American states. An expert on crime statistics, he advised the Federal Bureau of Investigation about statistical matters, and was a consultant to the Bureau of the Census on criminal statistics. He also headed, or was a member of, various United Nations panels of experts on criminological questions.

<sup>3</sup> See ABC report at: <http://www.abc.net.au/news/2015-05-11/png-says-death-penalty-under-review-after-indonesia-fallout/6460722>.

Queensland, to refute the argument that capital punishment acted as a deterrent to potential murderers.

## **The abolition of capital punishment in Queensland (1922)**

Queensland was the first state in the British Commonwealth to do away with the death penalty.<sup>4</sup> The abolishing capital punishment had been a policy priority for Labor Premier T J Ryan when his government took office in 1915. But it was not until the Legislative Council had voted itself out of existence in that Ryan's successor, 'Red' Ted Theodore<sup>5</sup> could abolish the death penalty.<sup>6</sup>

Great Britain did not abolish capital punishment for another 43 years. In both Queensland and Great Britain, it was the upper house that was the obstruction to abolition. It was not quite as easy to overcome the resistance by the House of Lords as it was to eradicate Queensland's Legislative Council, and capital punishment was only abolished in Great Britain<sup>7</sup> in 1965, after the composition of the House of Lords had been substantially overhauled by the creation of Life Peers (some of whom were women).

At the opening of the Queensland parliament on 22 August 1916, the Governor announced a number of Ryan's proposed reforms, including (a) the abolition of the Legislative Council and (b) the abolition of capital punishment.<sup>8</sup>

The bill to abolish capital punishment was passed in the Legislative Assembly but was defeated in the Legislative Council. However by 1921 the Labor government had managed to appoint enough Labor members to the Legislative Council to have the 'numbers' to abolish it, making the Queensland Parliament unicameral. The abolition Act was proclaimed in 1922.

Capital punishment was abolished in 1922 by the Legislative Assembly. There were no drawn out, major inquiries. It had been Labor Party policy.

It was not so easy in Great Britain.

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<sup>4</sup> See R N Barber, 'The Labor Party and the Abolition of Capital Punishment in Queensland 1899-1922', *Queensland Heritage*, 1, 9, pp.3-12. <http://www.textqueensland.com.au/item/article/602cbc133c2a441cb848029e6524cd6d>.

<sup>5</sup> Queensland Premier from 1919–25.

<sup>6</sup> [For an account of the abolition of the Legislative Council see: https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet\\_3.20\\_AbolitionOfTheLegislativeCouncil.pdf](https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_3.20_AbolitionOfTheLegislativeCouncil.pdf)

<sup>7</sup> Capital punishment for murder was not abolished in Northern Ireland until 1973.

<sup>8</sup> Parliamentary Debates [Hansard], Queensland Legislative Council, 22 August 1916. [https://www.parliament.qld.gov.au/documents/hansard/1916/1916\\_08\\_22\\_C.pdf](https://www.parliament.qld.gov.au/documents/hansard/1916/1916_08_22_C.pdf)

## The abolition of capital punishment in Great Britain (1965/69)

In Great Britain, various groups, particularly the Quakers, had been putting pressure on politicians to abolish capital punishment for almost 100 years before it was abolished.

The British penal code had been roughly similar to that of other comparable European countries until the eighteenth century. However, while criminal justice on the Continent became somewhat more humane under the influence of the Enlightenment, the reverse was true in Britain. Some social historians suggest that this was the result of an expanding and increasingly wealthy governing class who feared the newly-industrialised working class. This fear was reflected in a highly punitive law and order regime.

Between 1700 and 1820 capital offences were increased from about fifty to two hundred and twenty. Of these offences many were quite trivial, if indeed in some cases offences at all – stealing turnips, consorting with gypsies, damaging a fishpond, impersonating an out-pensioner at Greenwich Hospital, being found disguised in a rabbit warren, picking a pocket, shoplifting and the like.<sup>9</sup>

It is an indication of the public attitude towards hanging that in the mid-eighteenth century there were eleven public holidays in Britain: three Christian festivals (Christmas, Easter, Whitsun) and the eight hanging days at Tyburn.<sup>10</sup>

‘Hanging, drawing, and quartering’ - the procedure whereby a half-strangled convict is cut down, eviscerated, and castrated alive, and then dismembered and burned - was the big attraction at what is now Marble Arch on the north-eastern corner of Hyde Park, then called Tyburn. Grisly keepsakes were commonplace. Favourable vantage points were for sale. Ministers of religion (usually Protestant) were on hand. Executioners were celebrities. The free availability of strong drink, loose women, and a generalized atmosphere of fiesta were of the essence.<sup>11</sup>

The pressure to abolish the death penalty altogether began after the First World War, but it was not until 1929, under a Labour government, that a Select Committee was established to examine the question. It recommended suspension of the death penalty for a trial five-year period.

The recommendation was not adopted by the Commons until 1938 (just before the Second World War) when, in a free vote, the House passed a motion calling for a five-year trial to abolish hanging in peace time. This motion was stalled in 1939 when the Home Secretary opposed the proposed abolition clause being inserted into the wide-ranging Criminal Justice Bill which had reached the committee stage in Parliament, because he feared its

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<sup>9</sup> C Hollis (1964) *The Homicide Act* (London: The Trinity Press), p.1.

<sup>10</sup> Hollis, p.9. See also A Koestler (1994) 'Reflections on Hanging', *The Trail of the Dinosaur* (2nd edn: London: Vintage), pp.176-179 (first published by Gollanz in 1956).

<sup>11</sup> C Duff (2001) *A Handbook on Hanging* (New York: New York Review of Books Classics). Introduction by C Hitchens. Hanging, drawing and quartering was abolished in England by the *Forfeiture Act 1870*.

inclusion would jeopardise the passage of his wide-ranging Bill through the House of Lords.<sup>12</sup>

In April 1948 another new clause, put forward by the most persistent abolitionist in Parliament, Labour member Sidney Silverman, was accepted by the House. The Home Secretary announced that the Government could not recommend the House to support the clause because it was not in accord with public opinion.<sup>13</sup> In a 'free' vote (which was not free for Ministers who were required to vote according to the Government's decision to oppose the clause) the Commons agreed, by a narrow majority, to suspend the death penalty for an experimental period.

The emotions raised by this contentious debate were running high:

In spite of the Home Secretary's weightily delivered counsel against such a reform at this time, the House of Commons amid scenes of fervent enthusiasm decided tonight by 245 votes to 222 to suspend for an experimental period of five years the death penalty for murder. ... It was a remarkable culmination to a debate which one member had described as great and historic, and which had evidently stirred the deepest feelings in the House.

Excitement had been steadily rising in the crowded chamber during the closing stages of the debate on a new clause to be added to the Criminal Justice Bill, but jubilation found vent in a roar of cheering when it was evident how the voting had gone.<sup>14</sup>

The amendment still had to go to the House of Lords, which had traditionally been strongly opposed to abolition. Before the Lords debated the issue, *The Times* considered the nature of the decision they would face, given the not entirely free vote in the Commons, concluding:

Whatever the strength of the argument for the suspension of the death penalty no responsible supporter of the decision of the House of Commons can reasonably deny that this is a case where the revising and delaying power of the House of Lords can properly be exercised.<sup>15</sup>

Delay it did, decisively. On 4 June 1948, after a two-day debate, the House of Lords rejected by 181 to 28 the proposed trial abolition clause. The Criminal Justice Bill was passed by the Lords on 5 July without the abolition clause. Later in July the Government put forward a 'compromise' proposal: to establish two degrees of the offence of murder, and to suspend the operation of the death penalty on murderers found guilty only in the second degree. The Commons 'in an atmosphere of mounting excitement' adopted the

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<sup>12</sup> Further consideration of the Criminal Justice Bill was delayed by the onset of the Second World War, but the issue did not leave the public agenda for long, and became the topic of lively exchanges in the correspondence columns of *The Times* after the war. In November 1947 the Criminal Justice Bill was back on the parliamentary agenda, initially without a clause on capital punishment - which still could be added on a motion after the legislation had been through the committee stage. It was a Conservative Home Secretary, Samuel Hoare, who had opposed the abolition clause in 1939, because he feared that including it would impede the passage of the Criminal Justice Bill. The Labour Government that had come to power in 1945 was equally hesitant. The new Home Secretary, Chuter Ede, introducing the Second Reading of the Criminal Justice Bill in November 1947, said that the Government did not regard the time as 'opportune' to include the clause, because of the rising crime rate, but that it recognised this was a matter on which strong, individual, conscientious feelings were held.

<sup>13</sup> E A Gowers (c1950) address at Leeds University (Gowers archives).

<sup>14</sup> 'Suspension of the Death Penalty', *The Times*, London, 15 April 1948.

<sup>15</sup> 'Capital Punishment', *The Times*, London, 17 April 1948.

new clause by 307 votes to 209. The game of parliamentary ping-pong continued. The compromise clause went to the House of Lords, where it was rejected 'not merely decisively but derisively'.<sup>16</sup> The Government then threw in their hand. The Criminal Justice Bill was passed without any provisions about capital punishment'.<sup>17</sup>

### **The Royal Commission on Capital Punishment, 1949-1953**

In May 1949, after yet another public campaign to abolish the death penalty, the Attlee Government avoided the issue by appointing a Royal Commission on Capital Punishment and asked Ernest Gowers to chair the inquiry. The Royal Commission was given limited terms of reference in an attempt to dampen down what had become a highly-charged political debate, a limitation which prevented it from directly considering the abolition of the death penalty.<sup>18</sup>

Nonetheless its report exerted a strong influence on the discussions that took place between its tabling in 1953, and the ultimate abolition of the death penalty over a decade later. The report provided evidence in a debate previously characterised by assertions based more on belief than evidence, and clarified many of the issues being hotly argued in the political arena and in the media.

The impact of the Report was widely recognised. For example, in 1964, Terence Morris and Louis Blom-Cooper published *A Calendar of Murder: Criminal Homicide in England since 1957*. It was dedicated to Ernest Gowers:

Sir Ernest Gowers, GCB, GBE, Chairman of the Royal Commission into Capital Punishment 1949-1953 whose report ranks as one of the great social documents of our age, and whose recommendations have been - to the country's detriment - spurned by the legislature.<sup>19</sup>

The most significant issue over which there was strong disagreement was whether or not the evidence available supported the view that capital punishment had a deterrent effect. The Commissioners gathered international evidence on the deterrent effect (or otherwise) of capital punishment, and was able to include Australian comparisons - between Queensland that had abolished capital punishment and New South Wales that had not.

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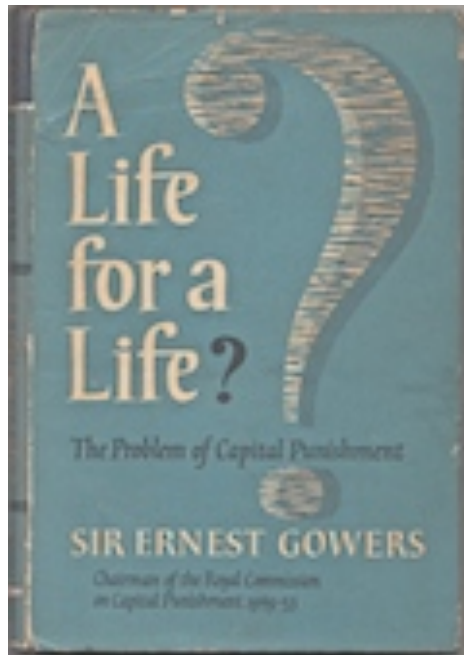
<sup>16</sup> E A Gowers (c1950) address at Leeds University (Gowers archives). This was a talk Gowers gave to Leeds University students, and the term 'derisively' is his.

<sup>17</sup> Peter Hennessy, (1993) *Never Again: Britain 1945-1951*, (London, Vintage Books), p.447.

<sup>18</sup> 'To consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and, if so, to what extent and by what means, for how long and under what conditions persons who would otherwise have been liable to suffer capital punishment should be detained, and what changes in the existing law and the prison system would be required; and to inquire into, and take account of, the position in those countries whose experience and practice may throw light on these questions.'

<sup>19</sup> T Morris and L Blom-Cooper (1964) *A Calendar of Murder: Criminal Homicide in England since 1957* (London: Michael Joseph).

## ***A Life for a Life? The Problem of Capital Punishment***



The evidence and arguments in the Royal Commission's report, and Gowers' subsequent book, *A Life for a Life? The Problem of Capital Punishment*, had a significant influence in the ensuing debate over capital punishment.<sup>20</sup> Between 1953 and 1965 he campaigned for the abolition of the death penalty, frustrated by the terms of reference of the Royal Commission, and profoundly affected by the evidence, both statistical and ethical. *A Life for a Life? The Problem of Capital Punishment* was an integral part of his contribution to that campaign.<sup>21</sup>

In his 'Foreword', Gowers explained his motivation for writing the book:

There is much in the Commission's Report, and more in their Minutes of Evidence, that has an important bearing on the larger issue. It is not however readily accessible. Both the Report and the Minutes are expensive and voluminous; the parts that will help anyone who is trying to make up his mind about the merits of capital punishment occur here and there among a larger amount of matter that is not to the point, and finding them is laborious.<sup>22</sup>

In the book he examined how far capital punishment served the ends that punishment was intended to serve: deterrence, reformation<sup>23</sup>, and retribution. He considered whether some less barbaric penalty might serve the purpose equally well. The Commission

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<sup>20</sup> E A Gowers (1956) *A Life for a Life? The Problem of Capital Punishment* (London: Chatto and Windus).

<sup>21</sup> Ernest Gowers had been a British civil servant whose career spanned working with Lloyd George on the introduction of the National Insurance Scheme just before the First World War, to running the London Civil Defence Region in the Second World War. After he retired, at the request of the British Treasury training branch, he wrote *Plain Words: A Guide to the Use of English* (HMSO 1949) which became an instant best-seller, and has never been out of print (see <https://www.penguin.com.au/products/9780141975535/plain-words-guide-use-english>). The last ten years of his life were devoted to revising *Fowler's Modern English Usage* (Clarendon Press, 1965).

<sup>22</sup> Gowers, *A Life for a Life? The Problem of Capital of Punishment*, p.7.

<sup>23</sup> Obviously 'reformation' cannot apply to the death penalty.

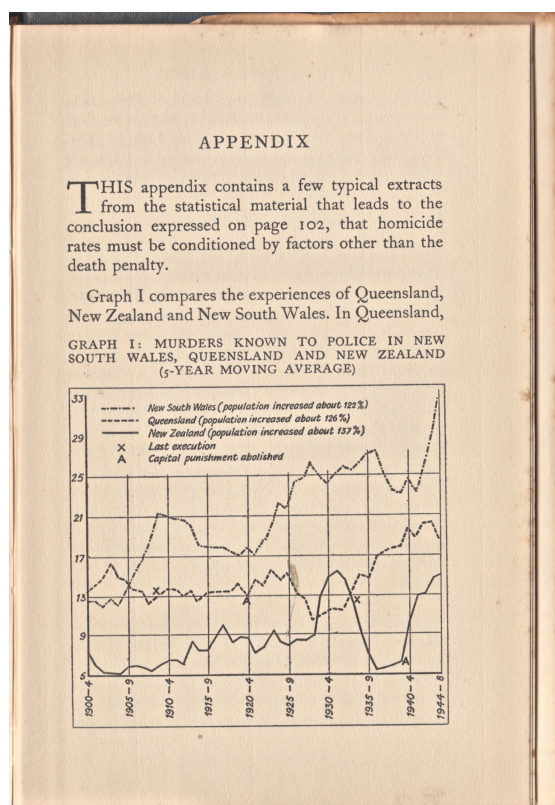
particularly examined the question of whether capital punishment acted as a deterrent. Gowers included a number of the Commission's graphs as an Appendix to his book, to illustrate the statistical evidence that the Royal Commission had gathered.

## The 'evidence' put before the Royal Commission

As Conservative MP and abolitionist, Christopher Hollis, wrote:

Doubtless those who appointed it [the Royal Commission on Capital Punishment], and many others, thought that its fate would be the same as that of many other Royal Commissions - a mountain of evidence, a judicious and conscientious report and then a final resting-place in a Whitehall pigeon-hole.<sup>24</sup>

The Royal Commission wanted to test the argument that the death penalty was a deterrent by comparing countries or states which had abolished the death penalty with those that had not. Australia and America were useful sources as they comprised individual States with different laws on capital punishment, making comparison relatively easy. The three graphs here are taken from *A Life for a Life?*<sup>25</sup>



**Graph I: Compares the experiences of Queensland, New Zealand and New South Wales<sup>26</sup>**

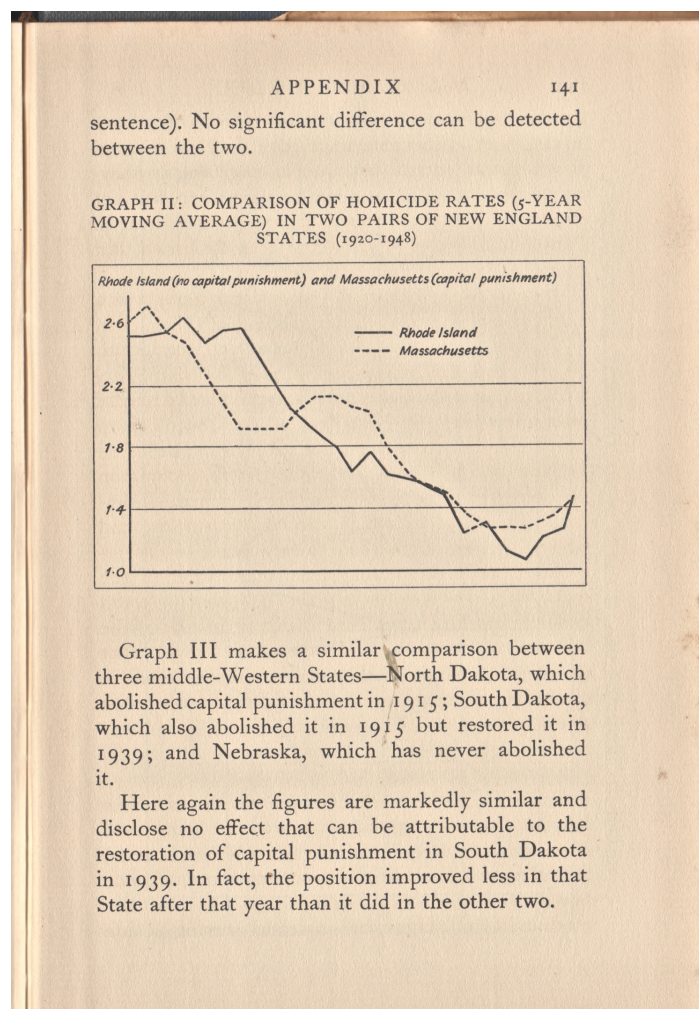
<sup>24</sup> Christopher Hollis (1964) *The Homicide Act* (London: The Trinity Press), p.1. Hollis was a Conservative MP in the House of Commons: where 'he showed an independent spirit, for example by supporting the abolition of [capital punishment](https://en.wikipedia.org/wiki/Capital_punishment) while that was not his party's general view. ([https://en.wikipedia.org/wiki/Christopher\\_Hollis](https://en.wikipedia.org/wiki/Christopher_Hollis))

<sup>25</sup> Created in an age before computers became universal.

<sup>26</sup> These statistics were compiled and published in a pre-technological era, so the graphs are not very clear. However, 'X' on the line marks the last execution held in the country or state, and 'A' marks the date when the death penalty was abolished.

Persuasive statistical evidence came from the Antipodes: a comparison between Queensland, (which had abolished the death penalty in 1922), New Zealand (which had abolished the death penalty in 1940), and New South Wales which still had the death penalty. The New South Wales homicide trend, where capital punishment had not been abolished is shown on the top line. The middle line shows Queensland, where there had been a rise after abolition, followed by a drop at the time when the New South Wales homicide rate was rising. The bottom line shows New Zealand where there had been a sharp rise after abolition (and where the death penalty was reintroduced in 1950).<sup>27</sup>

Graph II, from *A Life for a Life?* is interesting because it compares the figures from 1920 to 1948 of two neighbouring states on the north-east coast of America: Massachusetts, had retained the death penalty; Rhode Island had abolished it in 1852.



**Graph II compares Rhode Island and Massachusetts  
(New England, USA)**

<sup>27</sup> Gowers noted that in most countries studied there had been an (unexplained) rise in the homicide rate just after the Second World War.



The Royal Commission was able to draw on the expertise of some of the leading criminologists of the day, as well as a wide range of other experts from the hangman, prison officers, prison commissioners, prison chaplains, Home Secretaries, lawyers, the churches, members of the medical profession, and people with experience from other countries.

The statistical evidence demonstrated that capital punishment was not a deterrent to potential murderers. Other evidence was descriptive rather than statistical, but clearly deeply affected members of the committee.

They had to consider the methods used to execute convicted murderers, comparing hanging, with other methods such as electrocution, gassing, or applying lethal injections. They were given a minute-by-minute account of the process of hanging: from the day-long prisoner-watch beforehand, to the weighing of the prisoner so the length of the 'drop' could be adjusted, the 'rehearsal' using bags of sand weighing the same as the convicted prisoner. The hangman, referred to as Pierrepoint, told the Royal Commissioners that the 'knot is the secret' of a clean hanging ... The Medical Officer pronounced death, the body was left to hang for an hour (for no apparent reason), the body was buried in the prison graveyard during the ensuing dinner hour. ...

Other evidence came in the form of opinions from representatives of the Church of England, Judges, Home Secretaries (the men who had to sign the final death warrants), and also 'popular opinion'.

Gowers considered the 'burden of proof', and quoted a speaker in a House of Lords debate in 1948, referring to the arguments put forward by a previous speaker:

The Noble Lord ... refused to entertain the evidence about the statistics for foreign countries. He said that he preferred his own ideas about what was evidence. This, in fact, turned out to be that nearly all the Home Secretaries, with one distinguished exception, and all the Judges, favour the continuation of the death penalty. To my lay mind **that is not evidence**. It is **opinion** - valuable opinion; but it is not evidence.<sup>28</sup>

In *A Life for a Life?* Gowers led the reader through the arguments and the evidence, and concluded that it was difficult to say just what it was that converted him to his, by then, firmly abolitionist view. It was the cumulative effect of many things, he wrote, including such considerations as:

- the right approach for a professedly Christian people;
- the manifestly objectionable, not to say repulsive, features of capital punishment and the morbid interest they excite;
- the possibility, however small, of hanging an innocent man or woman; and
- the large part that the element of vengeance seems to play in the demand for capital punishment.

Gowers described his own change of heart, from retentionist to abolitionist:

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<sup>28</sup> Cited in Gowers, *A Life for a Life*, p.71.

Perhaps the turning-point was when I learned what a large number of applications there were for the post of hangman. Any State institution, I thought, that inspires ambitions of that sort in its citizens, and satisfies some of them, though it does not necessarily stand condemned, surely does need to justify itself on utilitarian grounds.<sup>29</sup>

## **Reforming the House of Lords and suspending the death penalty**

It took several more years from the tabling of the Royal Commission's report, to the abolition of the death penalty in Great Britain.

In 1957 a Private Member's Homicide Bill was debated and passed by the Commons, and rejected by the House of Lords. It was later agreed that the evidence in the Royal Commission Report, and Gowers' book *A Life for a Life?* - which his publishers timed so that they could get a copy to every member of the House of Commons and the House of Lords before the Bill to abolish the death penalty was debated - had started to turn around public opinion.

The *1958 Life Peers Act* created a new category of member of the House of Lords. That made the House of Lords somewhat more democratic, and it also allowed women to be appointed. In 1958 four women were made life peers, including one of Gowers' friends, Barbara Wootton, an expert in sociology and penal reform.

On the 28th of October 1965, a Private Member's Bill to suspend the death penalty, sponsored by Sydney Silverman, received Royal Assent. It was supported by the government and the Home Secretary. On 9 November 1965, the *Murder (Abolition of Death Penalty) Act* suspended the death penalty for murder for a period of five years.

Baroness Barbara Wootton introduced the Bill to the House of Lords. After an extremely tense debate, it passed.<sup>30</sup>

## **Permanent abolition of the death penalty (1969)**

Four years later, on 16 December 1969, by a vote of 343 in favour, 185 against, a majority of 158, the House of Commons voted to permanently end hanging in Britain. Home Secretary James Callaghan opened the debate, telling a packed House the number of murders in Britain had varied between a low of 114 and a peak of 154 over the years between 1957 and 1968: 'These figures show that the murder rate is not soaring as a result of the abolition of capital punishment but remains remarkably stable'. In a gesture of cross-party support, the Labour Prime Minister, Harold Wilson, the Conservative leader, Edward Heath, and Liberal leader Jeremy Thorpe walked through the same lobby to

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<sup>29</sup> Gowers, *A Life for a Life*, p.135.

Compare this with the statement by PNG's secretary for the Department of Justice and Attorney-General: 'In this country we have very strong support for the implementation of the death penalty. For example, one of the (radio) talkback shows I went to, 33 people called. Of the 33, three opposed the death penalty, 30 of them fully supported the government's role, to actually offer to be the executioner.' See 'PNG government defends death penalty as new guidelines approved', ABC, 18.2.15): <http://www.abc.net.au/news/2015-02-18/png-government-defends-death-penalty-following-new-guidelines/6143738>

<sup>30</sup> Gowers just lived long enough to see the effective abolition of capital punishment. He died in April 1966, shortly after the publication of his revision of *Fowler's Modern English Language*.

support abolition. Two days later the House of Lords followed suit, voting by a majority of 46 to permanently abolish the death penalty.<sup>31</sup>

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<sup>31</sup> For a full report see the BBC 'On This Day' 16.12.69: ([http://news.bbc.co.uk/onthisday/hi/dates/stories/december/16/newsid\\_3258000/3258437.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/16/newsid_3258000/3258437.stm))