Morant and his co-accused deserve posthumous pardon

There's evidence justice was not done in 1902, and parliament is in a position to offer redress

JAMES UNKLES

Lieutenants Peter Handcock, left, and Harry 'Breaker' Morant (with dog) during the Boer War; and the author, military lawyer and Navy Reserve officer James Unkles, above right

There is one case of Australian military and legal history that continues to ignite passionate debate: the execution of lieutenants Harry "Breaker" Morant and Peter Handcock and the sentencing of Lieutenant George Witton to life imprisonment 116 years ago.

The debate today is not about whether they were guilty of executing prisoners during the Boer War in 1902. It is about whether they were denied justice.

In my view, justice was not served. In the eyes of the law and the Australian community, a wrong is never diminished by the passage of time. It is our duty to put it right. We will get the opportunity to start that process on Monday, when a motion acknowledging the injustice of the sentences will be presented to the federal parliament. The motion, moved by Scott Buchholz, MP for the south-east Queensland seat of Wright, and seconded by former defence minister Kevin Andrews, expresses sincere regret that the three men were denied procedural fairness, acknowledges that this had cruel and unjust consequences, and expresses sympathy to the descendants of the men, as they were not tried and sentenced in accordance with the law of 1902.

If approved by parliament, it becomes a strong and compelling stepping stone towards posthumous pardons for the three.

The Australians were convicted of shooting prisoners during the 1899-1902 Boer War. They served as volunteers in the Bushveldt Carbineers, a British unit that was created for the particular purpose of subjugation of guerilla activity in the outlying areas of the northern Transvaal.

In the language of our time, it was a counter-insurgency unit.

More than 16,000 Australians served under British command and almost 600 died during the course of the Boer War.

It is not disputed that Handcock, Morant and Witton executed Boer prisoners while believing they were acting under lawful orders given by senior British officers, in particular Lord Kitchener. This may lead some to conclude that natural justice was served by the execution of Morant and Handcock, but why were they treated differently to other British officers and troopers guilty of the same crimes?

Before Morant's arrival at Ford Edward, in northern Transvaal, six Boer prisoners, a Boer member of the Bushveldt Carbineers and several natives were shot by British regulars in similar circumstances. No charges were laid.

It is such discrepancies that convinced me that they were not afforded fair trials and there is a need to review the case and determine whether these men were tried and sentenced according to the exacting provisions of the Manual of Military Law, 1898, and the Army Act.

Serious breaches of law began from the time of their arrest and interrogation in October 1901 through to their trial and execution on February 27, 1902. Of the many points of contention, three stand out:

> Why were they treated differently to other British officers guilty of the same crimes?

- The men were denied legal representation between their arrest and the day before their trial began in January 1902, when Major John Francis Thomas, a country solicitor from Tenterfield, northern NSW, with no trial experience, answered a plea for assistance. With no time to construct a defence and interview key witnesses about the existence of orders to take no prisoners, he mounted a brave but fruitless defence.
- The law of reprisal was a recognised defence in 1901 and evidence existed that these men reasonably believed that they had to follow orders to take no prisoners.

British judge advocate-general James St Clair confirmed that orders were given and my research has since convinced me that Lord Kitchener and his subordinates gave those orders.

- The courts martial members cited compelling mitigation for Morant, Handcock and Witton. Recommendations for mercy were made that the three accused be spared death sentences. However, only Witton's sentence was commuted. After confirming the death sentences, Lord Kitchener left Pretoria and told his staff he was uncontactable, thereby denying the Australians their legal right to appeal to King Edward and seek the assistance of the Australian government. This was a calculated perversion of the course of justice.

This case has drawn the attention of senior Australian legal counsel and MPs, including noted jurist and human rights advocate Geoffrey Robertson QC, who said: "They were treated monstrously. Certainly by today's standards they were not given any of the human rights that international treaties require men facing the death penalty to be given. But even by the standards of 1902 they were treated improperly, unlawfully."

Sir Laurence Street, former chief justice of NSW, has called on the British government to appoint an inquiry on the grounds that: "This is an appalling affront to any general notions of justice, and an appalling injustice to the remaining living man. This was an exercise of the administration of criminal justice which sadly miscarried." In 2010, the Australian House of Representatives petitions committee declared the case "strong and compelling and deserving of justice". How then to bridge this gap between Australia's realisation that this case reflects some injustice, and British intransigence and denial?

Ever since the executions, there has been a view that the three men were used as pawns by the British to secure a peace treaty to bring the brutal Boer War to an end — an event that happened three months after the executions. Witton put this proposition in his book, *Scapegoats of the Empire*.

I hope Monday's parliamentary motion will be a prelude to a formal parliamentary inquiry to assess the matter and, if recommended, begin the process of achieving posthumous pardons.

It is essential that we should seek redress because Australia is an independent nation in control of its own destiny and because, as former attorney-general Robert McClelland put it, the case "goes to the moral values and fabric of a nation. We know these wrongs were done. There were fundamental flaws in the criminal process that resulted in these people being executed, and when that injustice occurs it needs to be revisited and certainly it is a matter of public interest that that occur."

The Australian government between 1902 and 1904 took action to gain the release of George Witton. The present government should now finalise the matter of pardons, 116 years after the executions.

The descendants want and deserve justice to be done and a compelling case exists that should be assessed by a parliamentary inquiry. Morant, Handcock and Witton should get the justice Australians believe is long overdue.

James Unkles is a lawyer and an officer in the Navy Reserve. His opinions are personal and not expressed on behalf of the Australian Defence Force. breakermorant.com.