CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

in conjunction with

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A LIFETIME FOR A LIFE – MANDATORY LIFE IMPROSIONMENT FOR MUDER

by

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A LIFETIME FOR A LIFE – MANDATORY LIFE IMPRISONMENT FOR MURDER

Mandatory life imprisonment for murder is a matter which has excited the interest of the criminal lawyers of the Northern Territory for all the years of the operation of the Northern Territory ***Criminal Code***. It commenced its operation on 1 January 1984.

The *Code* provides for the offence of murder in section 162. It includes deaths caused while intending to kill or do grievous harm to *another* person and intent to do grievous harm to the eventual victim, as well as what may be termed *felony murder*. In other words, it covers circumstances where death followed an incident in which there was no distinct intention to kill.[1]

Section 164 provides for the punishment of murder in the following terms:

> *Any person who commits the crime of murder is liable to imprisonment for life which cannot be mitigated or varied under this Code or any other law in force in the Territory.*

This imprimatur is reinforced by the ***Sentencing Act***. Sections 53 and 56 provide for fixing of non-parole periods in respect of all sentences for periods of 12 months or more (and extending to *life*). The operation of those sections is expressly made non-applicable to the sentencing of an offender for the crime of murder.

It cannot be said that the Association (Criminal Lawyers Association of the Northern Territory) has campaigned relentlessly on this issue. From time to time its attention is attracted to and diverted by other Government initiatives. These have included the introduction and refinement of what are seen as:

(i) inflexible mandatory minimum sentencing regimes (predominantly for property offences, but more latterly in respect also of sexual and other offences of violence),
and

(ii) attacks on the independence of the judiciary and magistracy.

It is not proposed that the discussion in this paper be so diverted.

The attention of the Association was once again stimulated to the debate by some remarks made by Justice Steve Bailey while handing down sentence following the trial of Shaun Hudson for murder in Alice Springs in August 1999. His Honour said in imposing the only sentence possible, mandatory life imprisonment:

> *There is no reason or purpose for me to say anything more as to the facts. The law provides only one sentence of the crime of murder, life imprisonment without parole.*

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1 The full text of section 162 appears as Annexure A to this paper.

I have no discretion to impose any other sentence and in the circumstances of this case, I consider it will have to be less than satisfactory.

The present case is an example of mandatory sentencing in acting as a very blunt instrument. It's an admitted fact that Mr Hudson is a chronic petrol sniffer of longstanding and was under the influence of petrol on the day of the death.

If the sentence for murder was discretionary, these would be relevant factors in sentencing, despite, I might add, the horrific nature of the prisoner's crime.

As things stand, my hands are tied, but in my view I would say that consideration should be given to the reintroduction of discretionary sentencing for murder, coupled with the abolition of the partial defence of diminished responsibility.

In the circumstances, as I say, I have no discretion in the matter, and Mr Hudson is sentenced to life imprisonment without parole.

Some public debate followed. Richard Coates, one of the present authors, spoke on behalf of the Association. He then called for a minimum term for murder in place of mandatory life sentencing. He said that the Northern Territory is the only Australian jurisdiction without a minimum sentence provision in addition to a mandatory or non-mandatory life term.

This was followed by some debate reported in the press. A former VOCAL (Victims of Crime Assistance League) chairman was reported as rejecting a plea for mandatory life sentencing in the Northern Territory to end. He said people should serve *a minimum 20-year sentence*. It was noted that he had lost his mother in a murder/suicide some years before. In the same article, Chief Minister, Denis Burke, was reported as saying ***There's no such thing as a trivial murder***. Opposition Correction Services spokesman, Syd Stirling, called for *public discussion.*[2]

The *NT News* took up the issue. Its editorial of 17 November 1999 was headed *Limits on Sentences* and was in the following terms:

Lawyers have urged the Territory Government to change its policy on mandatory life sentencing to allow judicial discretion.

At present a life sentence for convicted killers means a minimum 20-year jail term, whether the crime was planned and pre-meditated or committed in a drunken rage.

Critics of this policy say the system fails to distinguish between different types of murder.

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2 *NT News*, 16 November 1999.

They say that, by definition, it means a crime of passion committed on the spur of the moment is as savage, brutal and depraved as a sadistic sex killing.

In addition, some lawyers argue that juries are reluctant to convict Territorians of murder because they know in advance the penalty will be 20 years.

Also, only a tiny percentage of people charged with murder in the Territory plead guilty to the crime, compared to other states.

Much of the focus behind the criticism of the mandatory life sentence is the excessive nature of a minimum 20-year term.

Other jurisdictions in Australia also have mandatory life sentences, but they have a mechanism that allows for an early release under certain conditions.

Interests

No such mechanism exists in the Territory.

There are those, including Chief Minister Denis Burke, who argue that murder is murder and that the bottom line is that a life has been taken.

They want the interests of the victims' living relatives to be considered when sentencing takes place and believe, correctly, that a minimum term prevents an early prisoner release.

They say a charge of manslaughter exists in the Territory as an alternative to murder.

This is misplaced justice.

If a murder is committed then the killer should be charged with murder – but that person's sentence should not be determined before the trial process is completed.

Only then should a sentence be imposed and it should be, within limits, at the discretion of the presiding judge after thorough deliberation of the facts by the jury.

This was too much for the politicians. The former Attorney-General and Chief Minister, Shane Stone, was still the member for Port Darwin, although on the backbenches. He asked his replacement in both jobs, Denis Burke, a *Dorothy Dixer* in the Legislative Assembly on 24 November 1999. He asked, in effect:

> *Would the Attorney-General confirm that the Country Liberal Party Government would not **back away** from mandatory life for murder?.*

The backbencher received, despite the interjections that followed, a strong commitment. The Chief Minister asserted:

> *The Northern Territory Criminal Code provides that the punishment for murder is imprisonment for life, which cannot be mitigated or varied under the Code or any other law. The life sentenced prisoners sentence is reviewed by the Parole Board after the prisoner has served 20 years of imprisonment. The Parole Board then makes a recommendation to the Attorney-General as to the release of the prisoner.*[3]

Other parts of his answer are more consistent with taking political advantage of the populist position established by the Government on this issue.

These authors know of no specific case where such a review, as specified in the Parliamentary answer, has been conducted. It would be unlikely that any of the 29 *lifers* presently imprisoned in Northern Territory jails have completed their 20-year terms (with the possible exception of ***Crabbe*** who has been sentenced, because of re-trials, pursuant to both pre and post-***Code*** provisions).[4]

The 20-year review principle referred to by the Attorney-General is one which is well-known, although shrouded in some mystery. It is understood that the principle was established by a confidential Cabinet decision in about 1991. Approval was given to a process for the Parole Board to review and make recommendations on life sentenced prisoners after 20 years had been served. They would thereafter be subject to a three-yearly review.

What would be the Government attitude to such a review and recommendation? The best guide might be the statement issued by the Attorney-General (as Chief Minister) and reported in the *NT News* on 9 October 2000. It also contained an unexpected, perhaps, response on behalf of the Opposition:

> *Convicted murderers would be wasting their time by appealing to the CLP for their freedom after serving 20 years, Chief Minister Denis Burke said yesterday. Mr Burke said although prisoners could apply to Executive Council comprising Cabinet ministers and the Administrator for release after 20 years, such an application was unlikely to succeed. He said yesterday: **The CLP Government's position is that life sentences mean life. The ability to plea for mercy is available to murderers after 20 years, but we are unmoved by such requests.** Mr Burke said Cabinet had received appeals from prisoners eligible to apply for mercy, but Cabinet had rejected such requests in the past. Opposition Leader Clare Martin said she wanted to know how long*

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3 NT Legislative Assembly Reports (8th Assembly Parliamentary Record No 20), 24 November 1999.

4 See table of Northern Territory Lifers; Annexure B.

> *such an option has been available to NT prisoners serving life. She said: **How has this 20 year option come about – Denis Burke needs to explain that.** Ms Martin said Labour policy on life sentences was that prisoners must serve mandatory life. Mandatory life imprisonment for murder in the Territory has meant for the term of a prisoner's natural life since the Criminal Code was introduced in 1984. Elsewhere in Australia, prisoners serving life can be eligible to apply for parole after 15 years. NT Criminal Lawyers Association president John Lawrence criticised NT life imprisonment last week, saying it compromised the justice system's integrity.*

Interestingly, it is again asserted that the ability to plea for mercy is available after 20 years.

As indicated, the only formal Government determination that seems to indicate this is the confidential Cabinet decision referred to (which presumably could be confidentially changed).

In February 2001, ***Quo Cheng Lai*** was convicted of murder after a trial before Justice Bailey. In sentencing ***Lai***, His Honour presented a reasoned and sensitive discussion on the policy of the Northern Territory in respect of mandatory life sentencing for murder. He described its provisions as unique. He concluded:

> *I say nothing about the present case. Just as a trial is almost inevitable on the charge of murder in this jurisdiction, so is an appeal almost inevitable. A convicted murderer has nothing to lose and everything to gain by appealing. I seek only to raise the questions, not to provide the answers. I consider the issue of mandatory life sentencing without possibility of parole, for murder, is an issue that is worthy of serious public debate.*

His Honour's remarks deserved to be treated seriously and are worth close study. They are attached to this paper.[5]

His Honour's remarks have no doubt been passed on to the Attorney-General. Given previous, and recently expressed views of the current Government, it is unlikely that action will follow.

Undoubtedly there have been some horrible crimes of murder committed in the Northern Territory in the last 20 years. A judge might well express himself very strongly in such cases. For example, in sentencing ***Heiss*** and ***Kamm***, Justice Nader made it clear that in his view, if their cases were ever considered by a Parole Board, very serious consideration needed to be given before ever releasing either of them.

In the recent Victorian case of ***Camilleri***, the Victorian Court of Appeal dismissed an application for leave to appeal against a life sentence without the possibility of parole for convictions for two murders following rape. Phillips CJ and Brooking JA said the

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5 Transcript 16 February 2001, pg 409-411, Annexure C.

SHAUN HUDSON, an Aboriginal male, aged 18 at the time of the offence, appeared before the Supreme Court at Alice Springs on 16 August 1999 and pleaded not guilty to one count of murder. A jury was then empanelled to try the case. The case was significant because of the manner in which the Crown presented its evidence to the jury. As there was no dispute between the Crown and the accused as to the facts essential to establish the case for the prosecution, the entire Crown case was presented by way of formal admissions made by the accused with no oral evidence at all.

Prior to trial it was agreed between the Crown and the defence that the sole issue for determination by the jury was whether the accused was of diminished responsibility at the time of the killing so as to reduce the verdict from murder to manslaughter. The onus of proving that the accused was of diminished responsibility was on the accused. Because the issue had to be proved by the defence, the standard of proof required was on the balance of probabilities.

The admitted facts were read out to the jury and tendered in evidence as an exhibit. The Crown then closed its case. The circumstances were that Hudson had anally raped, and then drowned a six year old female victim at a waterhole on the Finke River near Middle East Camp at Hermannsburg. It was in the presence of three of her young friends. The accused was a petrol sniffer.

The defence called one witness, a neuropsychologist who had some clinical experience in the Northern Territory with petrol sniffers. The effect of his evidence was that petrol sniffers do have reduced executive function. Ultimately, he conceded, in cross-examination, that the accused demonstrated reasonable executive function. The jury clearly did not accept the plea of diminished responsibility.

On 17 August 1999 the jury returned a verdict of murder and the accused was sentenced to mandatory life imprisonment. In sentencing, Justice Bailey made the remarks already noted.

PETER ANDREW FITTOCK was found guilty by a jury of one count of murder and one count of attempted murder on 11 November 1999. This followed a trial in Alice Springs.

Fittock had been in a relationship with the deceased for a number of months during the early part of 1998. In about May of that year the deceased ended the relationship and commenced another relationship with one J, the victim of the attempted murder. Fittock had difficulty coping with the termination of his relationship with the deceased and had made many attempts to reconcile his relationship with her to no avail.

On 6 November 1998 Fittock went to the Borroloola Inn where between 6.00 pm and midnight he consumed approximately 12 mid-strength beers. He then drove to his home where he consumed rum. He fully loaded a semi-automatic rifle with 21 rounds, took a bottle of rum and walked to the perimeter fence of the hotel where the deceased was working

After the deceased finished work at about 2.00 am on 7 November 1998 she went to a room in a demountable building situated not far from where the applicant was sitting. J was waiting for the deceased inside the room.

The deceased left the demountable at about 4.00 am. As she shut the door of the demountable she was confronted by Fittock who shot her once in the chest at point blank range killing her almost immediately. Another shot may have been fired.

Upon hearing the shot, J got up and went towards the door. As he did so, according to the Crown case, Fittock entered the demountable saying *Where's this cunt, I got some for him and I still got some for me*. The barrel of the gun was then pointed at J. Before Fittock could pull the trigger, J grabbed the barrel of the rifle and pushed it up into the air. As he did so Fittock discharged the rifle. A struggle then ensued with Fittock and J grappling for the firearm. During this time the rifle was discharged by Fittock on at least two occasions.

J was able to wrestle the firearm away from Fittock. Nearby hotel guests and staff then attended and assisted in restraining him until police arrived.

At trial, Fittock denied that the initial shot or shots fired were intended to, or in fact did, hurt the deceased. It was not his intention to kill her or J but merely to *talk* to them. The killing was accidental. The jury apparently did not accept this version of the events.

Fittock was sentenced to mandatory life imprisonment for murder and to 8 years imprisonment for attempted murder with a non-parole period of 4 years.

At the time of preparing this paper, an appeal to the Court of Criminal Appeal in Fittock was pending.[7] One of the grounds of appeal is as follows:

> *That to the extent that s.164 of the Criminal Code Act (NT) obliges a judicial Officer to impose a mandatory sentence of life imprisonment it offends the inviolable constitutional doctrine of the separation of powers. Further s.164 of the Criminal Code Act (NT) interferes with the integrity and independence of the judiciary and is therefore contrary to CH III of the Constitution. Therefore the applicant/appellant's sentence was contrary to Law.*

Clearly, there is a constitutional issue involved and it is possible that this matter will get to the High Court. A preliminary application for removal of the proceedings in November 2000 was unsuccessful.

EDDIE QUO CHENG LAI was convicted in Darwin in February 2001 of murdering his wife. In the process of sentencing the prisoner to life imprisonment, Justice Bailey remarked:

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7 The hearing is fixed before the CCA in Darwin for 12-13 June 2001.

> *There may be grounds for a legitimate debate as to whether one size fits all when it comes to murder, the present case may be one where the circumstances, the offence and the offender militate in favour of some discretion in sentencing for murder.*

The prisoner's case is a far more typical case of murder in Australia than the random and unprovoked violence of the truly evil or the hardened criminal.

Considerably less than one in five murder victims is killed by an offender who is unknown to them. Family and friends of the deceased in the present case may, quite understandably, take a different view, but the question ought to be asked as to whether the prisoner before the court today should be subject to the same punishment as a serial killer or someone who rapes and then kills his victim to eliminate the key witness against him.

The present prisoner is a man without criminal convictions of any kind. The available material suggests that he is an unsophisticated man who has worked long and hard in operating a business which remained open on a daily basis until late in the evening. He did this for some 17 years.

He and the deceased had four children together. He and the deceased built one house and then later bought another. His world apparently fell apart when his wife formed a relationship with another man.

The collapse of the prisoner's life was rapid.

Within a matter of weeks of learning of the affair, very soon afterwards the prisoner and the deceased separated and court orders were obtained, or at least agreed to, to enforce that separation.

He murdered his wife in circumstances, the precise details of which he has not revealed. It is not possible to say when he formed the intent to kill or cause grievous harm. Conceivably this could have been just before the deceased died.

CONCLUSION

One size does not fit all, whether they are murderers, rapists or housebreakers. Some degree of flexibility is needed in sentencing convicted murderers in the Northern Territory so that parity and justice may be achieved. A minimum non-parole period of 15 to 20 years, with the current power maintained not to fix a non-parole period at all in certain circumstances[8] would be a considerable advance. Alternatively, an assurance that the 20-year review principle would be implemented would be a step in the right direction.

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[8] Section 53 provides for the fixing of a non-parole period by a court *unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate.*

We suggest the delegates at this conference, and in particular those members of this Association, do not give up the fight. Furthermore, we recommend:

> *This conference resolve to request the Northern Territory Government to review its position in respect of mandatory life imprisonment for the offence of murder so that it is relatively consistent with the law in the rest of Australia.*

ACKNOWLEDGEMENTS

In preparing this paper we have been encouraged by John Lawrence, President of CLANT, who feels strongly on this subject, and by the obvious interest of Justice Bailey of the Supreme Court of the Northern Territory in achieving some reform. We have also been assisted by the arguments contained in a paper *Life without parole - sheer vengeance?* by Mark Hunter, a Darwin barrister (who apolgises for not being present at the conference). His paper first appeared in ***Balance*** (the journal of the Northern Territory Law Society) in January 2001. It has since been extended and revised and Mark has kindly given his permission for us to attach it as an annexure to our paper and for it to be distributed to delegates at the conference. The abstract which he has provided reads:

> *This article analyses the nature of a mandatory life sentence, where the possibility of parole has been excluded by legislation. The author compares the positions in the Northern Territory and New South Wales, these being the only jurisdictions in Australia with any form of mandatory life sentencing for murder. He discusses retributivist sentencing theory, utilitarian purposes of sentencing and the extent of their application in the case of mandatory life sentencing. The author argues the need for individualised sentencing for murder in the Northern Territory.*

Mark's paper follows as Annexure D.

RICHARD COATES & REX WILD

8 June 2001

Criminal Code

162. MURDER

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:

(a) if the offender intends to cause the death of the person killed or of some other person or if the offender intends to do to the person killed or to some other person grievous harm;

(b) if death is caused by means of an act done when committing or attempting to commit an offence referred to in subsection (2) which act is of such a nature as to be likely to endanger human life;

(c) if death is caused by administering any stupefying or overpowering substance for the purpose of facilitating the commission of an offence referred to in subsection (2) or for the purpose of facilitating the flight of an offender who has committed or attempted to commit such an offence; or

(d) if death is caused by stopping the breath of any person for either of the purposes referred to in paragraph (c),

is guilty of murder.

(2) The offences to which subsection (1) refers are -

(a) any crime for which the offender may be sentenced to imprisonment for 14 years or longer;

(b) any crime of which an assault or an intention to do or cause any injury or damage is an element and for which the offender may be sentenced to imprisonment for 7 years or longer; and

(c) an offence defined by section 112.

(3) In the circumstances referred to in subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(4) In the circumstances referred to in subsection (1)(b), notwithstanding section 31, it is immaterial that the offender did not intend to hurt any person or did not foresee the death of the deceased as a possible consequence of the act causing death.

(5) In the circumstances referred to in subsection (1)(c) or (d) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

NORTHERN TERRITORY LIFERS

File No.	Name	Judge	Date	Sentence commenced/ notes	Transcript
N/A	Thomas Harvey NEAL	Williams J	29.04.81	Transferred from Qld	NO
299-301/84 (8323578)	Martin LEACH	Muirhead J	16.05.84	16.05.84	YES
120/84 (8406475)	Andy ALBURY	Forster CJ	05.07.84	05.07.84	YES
238/84 (8416502)	James Edward Albert LITTLE	O'Leary J	12.12.84	12.12.84	YES
AS155 - 159 /83	Douglas John Edwin CRABBE	Rice J	07.10.85	07.10.85	NO - cannot locate. Copy of warrant indicates no backdating
183/86 (8606704)	Jacob AHWAN	Nader J	09.02.90	23.12.85	YES
138/88 (8815904)	Johnathan Peter BAKEWELL	Kearney J	26.05.89	27.02.88	YES
47/87 8707846	Alan Edward FORSCUTT	Asche CJ	20.09.88	Administrator's pleasure	YES
67/88 (8808171)	James Farrell WILLIRI	Kearney J	27.02.89	27.02.89	YES
151/89 (8922359)	Daniel Lothar HEISS	Nader J	31.01.91	05.08.89	YES
152/89 (8922372)	Peter Michael KAMM	Nader J	31.01.91	05.08.89	YES
31/89 (8905223)	John Allan Louis BENDER	Asche CJ	06.09.89	06.09.89	YES
30/89 (8905227)	Dennis ROSTRON	Asche CJ	19.01.90	19.01.90	YES
148/89 (8921644)	Lazarus NABOBBOB	Nader J	02.08.90	Administrator's pleasure	YES
26/90 (9003999)	Gonzales MUNGATOPI	Asche CJ	24.08.90	24.08.90	YES
87/90 (9014996)	Cosmos TIPILOURA	Gray A/J	19.04.91	19.04.91	YES
AS38/90 (9012693)	Edward Jagamara NELSON	Nader J	02.05.91	02.05.91	YES
51/91 (9104264)	Christopher THOMSON	Martin J	23.07.91	23.07.91	YES

File No.	Name	Judge	Date	Sentence commenced/ notes	Transcript
41/91 (9103947)	Glen Robert JOYCE	Asche CJ	02.08.91	02.08.91	YES
50/91 (9104262)	Shane Maurice BAKER	Martin J	13.11.91	13.11.91	YES
AS42/92 9252302	Stevan Patrick PRESLEY	Thomas J	19.06.93	19.06.93	YES
166/94 (9415651)	Kenny CHARLIE	Mildren J	04.10.95	11.08.94	YES
110/96 (9523545)	Ian Richard CONOLE	Kearney J	27.12.96	04.02.95	YES
168/94 (9417139)	Edward James HORRELL	Mildren J	15.06.95	15.06.95	YES
208/95 (9514427)	Roy Bernard MELBOURNE	Thomas J	13.06.96	27.07.95	YES
AS13 - 16/96	Anthony SCOTTY	Angel J	15.10.96	Administrator's pleasure	YES
9710088	Alistair NAROLDOL	Mildren J	15.12.98	30.04.97	YES
9615331	Graham LOFTY	Bailey J	28.05.98	28.05.98	YES
9823939	Peter Andrew FITTOCK	Thomas J	12.11.99	07.11.98	NO
9825802	Shaun HUDSON	Bailey J	17.08.99		YES
9904344	Anthony Werner JARC	Riley J	08.12.00	23.06.99	YES
9909126	Quo Cheng LAI	Bailey J	16.02.01	25.04.99	YES

The strain of incorporating four children into an existing family with three children has caused substantial problems for Maria Lai's own children. The pressure has resulted in Maria's parents returning to live in their native China, a matter disputed by the prisoner. There has been no financial assistance with caring for the deceased's children. The deceased's estate is yet to be settled and Maria Lai has incurred substantial Family Court costs in addition to the costs involved in disposing of the Ebony Coffee Shop.

There can be no doubt that the prisoner's crime has caused irreparable loss to his children and to the family and friends of the deceased.

The law provides for only one sentence in the case of a murder conviction: imprisonment for life. 'Life' means life in the Northern Territory. There is no provision for parole. The only possibility for a prisoner's release is an Act of the Executive to release a life-sentence prisoner on licence with or without conditions. Insofar as I am aware, no prisoner serving a life sentence has been released since the Northern Territory achieved self-government in 1978.

As I understand it, the present policy of the Executive is not to consider release until the prisoner has served a term of at least 20 years. There are 29 convicted murderers serving life sentences in the Northern Territory's prisons at Berrimah and Alice Springs. In addition, there is one offender classified as a persistent violent offender, who is subject to an indefinite sentence which could potentially see him remain in prison for the rest of his life. In contrast to the 29 prisoners serving life sentences, the persistent violent offender is required by law, to have his sentence reviewed by this court at regular intervals to determine whether it is safe to release him.

The Northern Territory's provisions for a mandatory life sentence, without possibility of parole in all cases of murder, is unique in Australia. New South Wales provides for a mandatory life sentence without parole only for murders so heinous as to qualify as the worst category of crime. All other States and the Australian Capital Territory either provide for a life sentence as a maximum punishment, rather than a mandatory requirement, or provide for a mandatory life sentence coupled with the discretion to fix a non-parole period.

Doubtless some, or even many, in the community would agree that murder demands a sentence extending to the term of an offender's life on the basis of an eye for an eye, a tooth for a tooth. In some circumstances of murder, the basis for such an approach may be strong, even overwhelming. Serial killers, armed robbers who kill in the course of their robberies, those who murder police officers or prison officers in an attempt to escape justice and those who abduct, rape and murder, are prime examples where few would argue against a sentence that requires an offender to be imprisoned for the rest of his or her life.

There may be grounds for a legitimate debate as to whether one size fits all when it comes to murder. The present case may be one where the circumstances

of the offence and the offender militate in favour of some discretion in sentencing for murder. The prisoner's case is a far more typical case of murder in Australian than the random and unprovoked violence of the truly evil or the hardened criminal.

Considerably less than one in five murder victims is killed by an offender who is unknown to them. Family and friends of the deceased in the present case may, quite understandably, take a different view, but the question ought to be asked as to whether the prisoner before the court today should be subject to the same punishment as a serial killer or someone who rapes and then kills his victim to eliminate the key witness against him.

The present prisoner is a man without criminal convictions of any kind. The available material suggests that he is an unsophisticated man who has worked long and hard in operating a business which remained open on a daily basis until late in the evening. He did this for some 17 years.

He and the deceased had four children together. He and the deceased built one house and then later bought another. His world apparently fell apart when his wife formed a relationship with another man. The collapse of the prisoner's life was rapid. Within a matter of weeks of learning of the affair, very soon afterwards the prisoner and the deceased separated and court orders were obtained, or at least agreed to, to enforce that separation.

He murdered his wife in circumstances, the precise details of which he has not revealed. It is not possible to say when he formed the intent to kill or cause grievous harm. Conceivably this could have been just before the deceased died. I do not minimise the seriousness of his crime or the pain and suffering caused to the deceased's family, friends and most particularly, his children who have been robbed of their mother and whose father is effectively lost to them.

The prisoner deserves to go to prison for a very long time indeed. The question is: should he and others who commit murder in similar circumstances, remain there for the rest of their natural lives, subject only to the hope of release by the exercise of Executive discretion?

As things stand, there is no incentive and no reason why anyone accused of murder, in the Northern Territory, would plead guilty. The sentence is the same whether a case goes to trial for days, weeks or months on end, or whether an offender admits his guilt, demonstrates true remorse, and puts forward something which can be properly accepted as mitigation.

I say nothing about the present case. Just as a trial is almost inevitable on a charge of murder in this jurisdiction, so is an appeal almost inevitable. A convicted murderer has nothing to lose and everything to gain by appealing. I seek only to raise the questions, not to provide the answers. I consider the issue of mandatory life sentencing without possibility of parole, for murder, is an issue that is worthy of serious public debate.

In the case of Quo Cheng Lai, there is no alternative, and I sentence Quo Cheng Lai to imprisonment for life.

MR WILD: Your Honour, the sentence is capable of being backdated and should be backdated to 25 April 1999.

HIS HONOUR: Yes, I am glad you reminded me of that, Mr Wild. It may be significant in the future.

MR WILD: Yes, Your Honour.

HIS HONOUR: I will backdate the sentence to 25 April 1999 to take account of the time already spent by the prisoner in custody.

Nothing else arising?

MR WILD: No, if Your Honour pleases.

MR COATES: If Your Honour pleases.

HIS HONOUR: Yes, thank you, gentlemen. I will adjourn.

ADJOURNED 11.28 AM INDEFINITELY

LIFE WITHOUT PAROLE - SHEER VENGEANCE ?

by Mark Hunter *

In the criminal justice system, "retribution" is the term commonly used to describe one of the purposes of sentencing. In the absence of a sentence mandated by legislation, the sentencer is required to consider, in addition to retribution, the protection of society, deterrence (personal or general) and rehabilitation in determining an appropriate sentence in a particular case - *R v Veen No.2* (1988) CLR 465 at 476. These are the three utilitarian objectives of sentencing. Denunciation of the criminal act goes hand in hand with retribution, but can be identified as a fifth sentencing purpose.

Section 5(1) of the *Sentencing Act*, 1995 (NT) replicates the common law position.

These sentencing purposes overlap and one normally cannot be considered in isolation from the others. The sentencer's job can be a difficult one because the different sentencing purposes "...are guidelines to the appropriate sentence but sometimes they point in different directions." *Veen* (ante).

Mandatory life

Mandatory sentencing in the magistrates courts of the Northern Territory creates a "hit or miss" sentencing process where the punishment specified by law for a particular offence may or may not be the sentence which would be appropriate after weighing up all the sentencing purposes.

Mandatory sentencing in the Supreme Court of the Northern Territory applies to *every* case of murder, for which legislation specifies imprisonment for life, without the possibility of parole ("life sentence") **(n.1)**. In this way, it is argued, the legislature has for one crime removed from the sentencing equation all but one of the purposes of sentencing: retribution.

In New South Wales mandatory life sentencing exists in respect of murders so heinous as to objectively fall within the "worst category" of the crime **(n.2)**. Judges in that state retain a discretion to impose a determinate sentence for all other murders. Mandatory life sentencing for murder exists in no other Australian jurisdiction.

Under mandatory life sentencing, vengeance (retribution) exists as the primary, if not the sole focus of a government policy that is implemented by the courts. None of the sentencing purposes are evaluated as part of an individualised sentencing exercise.

Since torture and execution are, like murder, uncivilised practices, the imposition of a life sentence may rank as the ultimate act of vengeance by a civilised society.

Incapacitation and retribution

Advocates of mandatory life sentencing for murder commonly emphasise the protection of society, in conjunction with retribution, as a relevant sentencing purpose. The protection of society has been identified as the aim of the deterrence element of an appropriate sentence in *any* case:

"...one of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, it has been the main purpose of punishment, and it still continues so." *R v Rushby* [1977] 1 NSWLR 594.

In *Veen* (ante), the "protection of society" was considered by the High Court in upholding the indefinite incapacitation of an offender who suffered from a chronic mental abnormality. The offender was found to represent a continuing danger to the community after committing one manslaughter only nine months after his release on parole for a separate manslaughter. On each occasion the offender stabbed his victim to death, was charged with murder, and successfully raised the defence of diminished responsibility. He was sentenced, in New South Wales, to "life imprisonment" and his appeal to the High Court was dismissed.

Only where the protection of society is found to require the indefinite incapacitation of an offender, does vengeance cease to be at least the primary basis for an indefinite sentence. Interestingly, the New South Wales Court of Criminal Appeal recently saw fit to re-determine Mr Veen's sentence. He will become eligible for, but not necessarily entitled to parole, in 2003 (*R v Veen*, unrep. NSWCCA 7/7/2000).

Under mandatory life sentencing the prediction of an offender's level of future dangerousness is irrelevant to the sentencing process. Incapacitation is simply a by-product of the legislature's unrestrained desire to exact retribution. Protecting society in the long term, by one government attempting to imprison an offender until death, is risky business. Society, governments and policies change. Change can come too late for all concerned.

Interstate experience

It is instructive to examine the result of the introduction in other jurisdictions of a sentencing discretion for murder.

For example, between 1955 and 1982, the mandatory penalty for murder in New South Wales was "penal servitude for life" but offenders became eligible for parole after an unspecified period. "Lifers" were, on average, released within 15 years. **(n.3)**

With the introduction of "truth in sentencing" legislation in 1989, prisoners already serving life imprisonment in that state became entitled, after serving eight years, to apply to the Supreme Court for a determinate sentence - a specified minimum period at the expiration of which the prisoner became eligible for parole **(n.4)**. This is a re-sentencing exercise. In the early 1990's the government passed amending legislation which specified 20 years served before a redetermination application could be made by lifers whose papers had been marked by the trial judge "never to be released".

Where, after a consideration of the crime and subjective elements (including post sentence rehabilitation) a determinate sentence has been refused, the Supreme Court of New South Wales has acknowledged that some "life means life" sentences are based primarily upon retribution:

"There are some cases where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty...we believe that this is such a case." - *R v Garforth* NSWCCA unreported 23/5/94, Gleeson, McInerney and Mathews JJ.

Thus the true nature of the life sentence imposed in this instance was identified as justice based overwhelmingly upon the concept of "an eye for an eye". Whereas the judges in *Garforth* were able to consider all four sentencing purposes before imposing a life sentence, Territory judges are denied a judicial discretion in sentencing for murder. They are in this way required to "rubber stamp" government policy.

The Chief Justice of New South Wales, the Hon JJ Spigelman, in June 1999 addressed staff of the Office of the DPP (NSW) in the following terms:

"The continued existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice" **(n.4A)**.

Justice has traditionally been depicted by the image of Themis, the blindfolded Greek goddess who holds aloft the scales of justice. The blindness of Themis (*Justice*) is attributed by some to her having lost "an eye for an eye". Taking this metaphor further, she is unable to see what is in the scales or how they are tilting. It may be argued that mandatory sentencing pinions the arms of *Justice*, such that she is prevented from even holding the scales.

NT criticism

The complete exclusion of a sentencing discretion for murder was in 1999 the subject of criticism by Justice Bailey in the Northern Territory Supreme Court. **(n.5)**

In February this year Justice Bailey called for "serious public debate" on the issue of mandatory life sentencing for murder **(n.6)**. His Honour observed that 29 convicted murderers are presently serving life sentences in Northern Territory prisons. Since the Territory achieved self-government in 1978, the only person released after receiving a life sentence has been Lindy Chamberlain. Bailey J questioned "...whether one size fits all when it comes to (sentencing for) murder".

Mercy

In the Northern Territory the conditional or unconditional release of a prisoner serving a life sentence can only take place where the executive arm of government exercises its prerogative of mercy pursuant to Part 10 of the *Sentencing Act*. The manner in which applications under Part 10 are dealt with by the Executive is not subject to judicial review- *Bugmy v R* (1990) 169 CLR 525.

It has been reported that the Northern Territory Chief Minister and Attorney-General, Denis Burke, declared last October: "...the ability to plea for mercy is available to murderers after 20 years, but we are unmoved by such requests" *NT News* 9/10/00.

Whether or not the quality of mercy is as advocated by Portia in Shakespeare's *The Merchant of Venice* (n.7), there is ample historical material to suggest that the discretionary use of executive power in restraint of punishment has *strengthened* power structures in this country and elsewhere. (n.8)

In the implementation of mandatory sentencing, mercy is prevented from taking its proper seat beside justice in Territory courts.

Personal Deterrence

The media perpetuate the popular perception of homicide as involving random and unprovoked attacks, usually against strangers, by crazed killers. The Hoddle Street, Strathfield and Port Arthur tragedies have reinforced this misconception. The reality is that between 1989 and 1996 only fifteen per cent of homicides committed in Australia were between strangers. (n.9)

Homicide tends to be the unplanned consequence of events that escalate out of control. More than any other crime, murder is principally the result of a dynamic social relationship between the individuals concerned. Over decades, the incidence of homicide in Australia has been relatively stable, whether the penalty for murder has been death or a life sentence. (n.10)

Statistics demonstrate the failure of even the most severe punishment for murder to act as a general deterrent to "like minded" members of the community. Mandatory life sentencing, however, never allows personal deterrence to be tested.

If personal deterrence for a particular crime demands a sentence of 15 or 20 years, a point is likely to be reached, well short of a life sentence, where "...the increase of years is really an exercise of the doctrine known in economics as the 'doctrine of diminishing returns'..." (n.11)

The life sentence redetermination procedure in New South Wales has demonstrated the inaccuracy of predictions of future dangerousness. In the Court of Criminal Appeal, Justice Wood recently noted :

"...offenders once considered hopelessly violent and dangerous have been the subject of a controlled and safe return to society" - *R v Harris* NSWCCA unrep. 20/12/00, para 127.

Some years earlier, Justice Allen had observed :

"It is the common experience of judges who have had to consider section 13A applications to note the remarkable effect which imprisonment for a decade or more so often has upon young offenders - notwithstanding how brutally and callously they acted when they committed the crime or crimes. Time and again one wonders: 'how could this apparently well adjusted applicant be the person who committed such a crime ?' Gone is the brashness. Gone is the bravado. Spent is the passion. Young offenders can change so much during a very long time in gaol as to present almost an entirely different sort of person." - *R v Crump* NSWCCA unrep. 30/5/93.

Justice and correction

Territory juries demonstrate a marked propensity to acquit on charges of murder. It cannot be assumed that jurors are unaware that a guilty verdict must inevitably result in a life sentence, irrespective of the circumstances of the crime. Mandatory sentencing offers an accused no incentive to plead guilty. A homicide rate in the Territory persistently more than *twice* the national average is indicative of a sentencing policy which fails to protect the community.

At the same time, an ever increasing number of lifers languish in the Territory's prison population, the size of which is more than *three times* the national average on a per capita basis. The cost of maintaining this population increased by almost $1 million to $148 million over the last financial year. **(n.12)**

The classification of prisoners serving determinate sentences focuses on rehabilitation combined with secure incarceration. Lifers are kept in maximum security conditions far longer. Without the prospect of eventual release, changes to their classification by prison authorities tend to be based upon their keepers' desire to avoid institutionalisation.

Management problems associated with an increasing number of prisoners devoid of the hope of eventual release are not hard to imagine. The homicide rate within prison is nationally up to seven times higher than in the general community.**(n.13)**

Parity of sentencing

In the Northern Territory, as in New South Wales, causing death with an intent to cause grievous bodily harm constitutes murder. Such a killing is in New South Wales accepted as being not as objectively serious as causing death with a specific intention to kill - *R v Lowe* NSWCCA unrep. 19/2/92, Grove J.

Where an intention to kill is present, the objective seriousness of a serial, contract or thrill killing will normally be greater than, for example, a killing of passion committed without premeditation.

Mandatory life sentencing ignores the principle of parity of sentencing. *Dis*parity between offenders in the number of years to be served becomes essential, and "...fairness is assessed not against the passage of time but against the occurrence of an event - the prisoner's death." **(n.14)**

Populist politics and retributivism

Retribution is becoming the primary political rationale in Australia for punishment, and mandatory sentencing is an example of populist politics and the implementation of retributivist sentencing theory.

Elected governments bear a responsibility to legislate for the greater good and not allow themselves to be led by vengeful minority groups or the media. In Australia and elsewhere, however, governments demonstrate a tendency toward populist, knee jerk responses on law and order issues.

What is the possible outcome of the continuation or acceleration of retributivism in Australia ? We need look no further than the United States for the answer to this question.

The situation in the U.S. shows the depths of retributivism to which the criminal justice system of a supposedly civilised country can sink in the name of governments "getting tough on crime" through mandatory sentencing. More than *eight million* Americans are now either in prison (2m), on parole/probation (4.5m) or employed by the criminal justice system (2m) **(n.15)**. Since 1980 the imprisonment rate of African Americans has tripled to one in every 30 per head of population. *One in every fifty* Americans is now either in prison or subject to supervision.

These statistics reflect the abandonment of utilitarian sentencing purposes. The focus of sentencing under retributive theory is backward looking. So long as an offender receives his or her "just deserts", retributivists argue that the sentencing system has succeeded, irrespective of future adverse consequences for the community **(n.16)**. Utilitarian links between crime and punishment cease to exist. The sentencing process comes to represent nothing more than the desire for revenge.

The tenure of the Clinton Administration saw the largest increase in the number of prisoners of any president in American history. Having secured and almost completed two terms as president, Clinton last October declared mandatory minimum sentencing to be "unconscionable", and called for a re-examination of the U.S. government's prison policy.**(n.17)**.

Between 1998 and 2000, the annual number of executions in Texas under (as he then was) Governor George W. Bush doubled to 40, this being almost half the total for the entire country last year **(n.18)**. This uncivilised and disgraceful sentencing system was responsible for a special "double execution", conducted in a Texas prison just three months prior to the most recent presidential election.

The abandonment of utilitarian sentencing purposes in the expansion of mandatory sentencing to include property offences has been acknowledged by the Northern Territory Chief Minister:

"That (crime reduction) was not the primary focus of mandatory sentencing. The primary focus of mandatory sentencing was to punish the offender" **(n.18A)**

Australia's prison population between 1988 and 1998 rose by approximately 60 per cent to 19,906 inmates **(n.19)**. Minimum mandatory imprisonment for property offences took effect in the Northern Territory in March 1997. The average daily number of persons incarcerated in the Territory increased by almost one third *in just two years* (June 1996- June 1998) **(n.20)**. By 1998, indigenous people accounted for more than 70 per cent of the Territory's adult prison population.

On 25 May this year Premier Bob Carr announced the *Crimes Legislation Amendment (Existing Life Sentences) Bill*. This populist and unfair piece of legislation demonstrates that hard cases can make bad law. The Bill specifically targets the killers of Anita Cobby, Janine Balding and Virginia Morse. These ten prisoners are the only murderers sentenced in New South Wales prior to the introduction of the *Sentencing Act*, 1989 (NSW) whose papers were marked by the sentencing judge "never to be released".

The Premier stated that under his government's proposed legislation, these ten prisoners will be *"cemented in their prison cells"*. Thus the threat of selective life sentencing through

legislation has arisen in Australia. The perpetrators of equally heinous crimes sentenced in New South Wales *after* 1989 will retain the possibility of both a determinate sentence and eventual parole.

Conclusion

Justice Wood, in the New South Wales Court of Criminal Appeal, recently described mandatory life sentencing as a "harsh and discriminatory regime" that runs the risk of establishing "a significant population of geriatric prisoners" - *R v Harris* NSWCCA unrep. 20/12/00.

Almost ten years ago, Justice Hunt (as he then was) made the following observations in the Court of Criminal Appeal of New South Wales:

"A civilised country does not act in the way that Moses laid down. Capital punishment has been abolished, and (except in extraordinary circumstances, which do not exist in this case) the law does not regard itself as permitting a slower and more painful death by locking away the murderer and throwing away the key." *Petroff*, NSWCCA unreported 12/11/91.

Approximately twenty prisoners in New South Wales, having been refused a determinate sentence by the Supreme Court, are now serving life sentences. **(n.21)**

The *proper* role of the criminal justice system was eloquently expressed by Justice Badgery-Parker in the following terms:

"It is natural in every case of violent crime, for the victims and their relations and friends to demand a severe punishment. No one would fail to understand that. However, the need which the criminal justice system exists to fulfil is the need to interpose between the victim and the criminal an objective instrumentality which, while recognising the seriousness of the crime from the victim's point of view and, in the case of murder, the magnitude of the loss which the victim's family and friends have sustained, attempts to serve a range of community interests which include but go beyond notions merely of retribution." - *R v Cribb* NSWCCA unreported 23/6/94.

If it can be assumed that eventually a Territory government will see the wisdom of individualised sentencing for murder, the protection of the community is best served by the law being changed sooner rather than later.

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Notes

1. *Criminal Code* (NT), s.164.
2. *Crimes Act*, 1900 (NSW) s.19A and *R v Twala* NSWCCA unrep.4/11/94 per Badgery-ParkerJ
3. Donelly H., Cumines S. and Wilczynski A.- *Sentenced Homicides in N.S.W. 1990-1993*,

Judicial Commission of N.S.W., 1995, Ch. VII.
4. *Sentencing Act*, 1989 (NSW), s.13A.
4A. As reported in speech by N. Cowdery QC to probation and parole officers,1999. See www.odpp.nsw.gov.au
5. *R v Hudson* NTSC unrep.1999. See also generally Goldflam,R. *That's Life* (*Balance* 10/99).
6. *R v Lai* NTSC unrep. 16/2/01.
7. "The quality of mercy is not strain'd,/It droppeth as the gentle rain from heaven/Upon the place beneath: it is twice bless'd;/It blesseth him that gives and him that takes..."(ActIV Sc1)
8. See Strange C. -*Qualities of Mercy*, University of British Columbia Press, 1996.
9. James M. and Carcach C. *Homicide in Australia 1989-1996*, Australian Institute of Criminology, 1997.
10. Ibid.
11. *When life means life*, by John Nicholson SC, Sen. Public Defender, NSW.
12. NT Correctional Services Report, 1999-2000.
13. James and Carcach, op. cit.
14. Nicholson, op. cit.
15. *Too little too late: President Clinton's prison legacy*, Report of Justice Policy Initiative, Washington, Feb. 2001. See www.cjcj.org/clinton/clinton.html
16. Bagaric M. *Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals ?*, Criminal Law Journal (Feb. 2000), LBC
17. Ibid.
18. Texas Department of Justice statistics. See www.tdcj.state.tx.us/stat/annual.htm
18A. NT Parliamentary Hansard, 22/4/99.
19. Australian Institute of Criminology statistics.
20. NT Correctional Services Annual Report, 1999-2000.
21. Nicholson, op.cit.

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Abstract

Life without parole - sheer vengeance ?
by **Mark Hunter**
This article analyses the nature of a mandatory life sentence, where the possibility of parole has been excluded by legislation. The author compares the positions in the Northern Territory and New South Wales, these being the only jurisdictions in Australia with any form of mandatory life sentencing for murder. He discusses retributivist sentencing theory, utilitarian purposes of sentencing and the extent of their application in the case of mandatory life sentencing. The author argues the need for individualised sentencing for murder in the Northern Territory.

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